TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1885.

No. 1172.

HENRY S. LITTLE, RECEIVER OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

JAMES HACKETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 22, 1885.

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Service of citation	2½	2
Judgment	3	2
Bill of exceptions	9	5
Evidence for plaintiff	10	5
Testimony of James Hackett	11	6
Joseph W. Brown	47	22
Lewis H. Rosebury	55	26
John O. Kline	57	27
Maitland Gardner	60	28
John O. Kline (recalled)	70	32
Wm. H. Tallman	78	36
Benaja Layton	87	39
James Hackett (recalled)	96	43
Evidence for defendant	97	44
Testimony of Edward Travis	97	44
John M. Morris	107	48
John R. Moore	116	52

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	Original.	Print.
John C. Kline	120	54
James Powell	136	61
Jonathan O. Stokes	144	65
John R. Moore (recalled)	165	74
Charge of the court	170	76
Assignment of errors	175	78
Stipulation to submit on printed arguments	180	81
Clerk's certificate	181	81
Diagram of West End Station	182	81

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between James Hackett, plaintiff, and Henry S. Little, receiver of the Central Railroad Company of New Jersey, a manifest error hath happened, to the great damage of the said Henry S. Little, receiver as aforesaid, as is said, and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

1½ Witness the Honorable Morrison R. Wait, Chief Justice of the Supreme Court of the United States, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United State the one hundred and tenth.

[The seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT,
Clerk of the Circuit Court of the United States of America for the District of New Jersey.

1¾ [Endorsed:] United States circuit court, district of New Jersey. Henry S. Little, receiver, &c., plaintiff in error, *vs.* James Hackett, defendant in error. Writ of error. Allowed this 11th of Sept., 1885. Jno. T. Nixon, district judge.

2 In the Circuit Court of the United States for the District of New Jersey. March Term, 1882.

JAMES HACKETT
vs.
HENRY S. LITTLE, Receiver of the Central R. R. Co. of New Jersey. } No. 86.

To James Hackett, the plaintiff above named:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district

of New Jersey, wherein Henry S. Little, receiver of the Central Railroad Company of New Jersey, is plaintiff and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, being the same rendered in the above-entitled cause, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

2¼ Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-five.

JNO. T. NIXON,
District Judge & ex officio Judge of the Circuit Court of the District of New Jersey.

B. WILLIAMSON, *Att'y.*

2½ [Endorsed:] United States circuit court, district of New Jersey. Henry S. Little, receiver, &c., plaintiff in error, *vs.* James Hackett, defendant in error. Citation to writ of error. Returnable Oct. 12th, 1885. R. W. de Forest.

Service of the within citation is hereby acknowledged.
Dated Sept. 11, 1885.

P. L. VOORHEES,
Att'y Def't in Error.

3 *In Case Judgment.*

United States Circuit Court, District of New Jersey.

JAMES HACKETT
vs.
HENRY S. LITTLE, Receiver of the Central Railroad of New Jersey.

As yet of the fifth day of April, A. D. eighteen hundred and eighty-two.

HON. JOSEPH P. BRADLEY,
Associate Justice.

Witness:
S. D. OLIPHANT, *Clerk.*

DISTRICT OF NEW JERSEY, *ss:*

Henry S. Little, receiver of the Central Railroad Company of New Jersey, a citizen of the State of New Jersey, duly appointed and commissioned by the court of chancery of said State of New Jersey receiver as aforesaid, the defendants in this suit, was duly summoned to answer unto James Hackett, a citizen of the State of Pennsylvania, plaintiff herein, of a plea of trespass on the case, permission to prosecute this suit having first been obtained from the said court of chancery of New Jersey; and thereupon the said plaintiff, by Peter V. Voorhees, his attorney, complains for that whereas one Francis S. Lethrop, heretofore, to wit, on the — day of
4 June, in the year of our Lord one thousand eight hundred and seventy-nine, and at the time of committing the grievance

hereinafter mentioned, was the manager and operator of a certain railroad extending through the village of Long Branch and divers other places in the county of Monmouth and State of New Jersey, together with the tracks, cars, locomotive-engines, and other appurtenances thereunto belonging as receiver of the Central Railroad Company of New Jersey, duly appointed by the order of the court of chancery of the State of New Jersey; that afterwards, and after the committing of the said grievance, the said Francis S. Lathrop departed this life, and the said defendant was thereupon duly appointed, by an order of the said court of chancery, receiver of the said The Central Railroad Company of New Jersey in the place and stead of the said Francis S. Lathrop, deceased, and by said order was invested with all the forms and subjected to all the liabilities incurred by the said Francis S. Lathrop, deceased, as receiver, as aforesaid, and that theretofore, to wit, on the day and year last aforesaid, at Long Branch, in the district of New Jersey, and within the jurisdiction of this court, the said receiver, by his certain servants, then and there had the management, care, direction, and control of a certain locomotive-engine and train of cars drawn by the same upon the said railroad, yet the said receiver, not minding or regarding his duty in this behalf, by his said servants and employes took so little and so bad care of the said locomotive-engine and the cars drawn by the same, as aforesaid, that by and through the mere negligence, carelessness, and mismanagement of the said receiver and his servant, or servants, employee, or employees, in that behalf, and for want of due and proper care of the said receiver and his servants and employees, with great force and violence directed and ran the said locomotive-engine and train of cars against, upon, and over the said plaintiff as he, the said plaintiff, was then and there lawfully crossing the said railroad in a certain street, or highway, called Brighton avenue, to wit, at Long Branch, in the district and within the jurisdiction aforesaid, whereby the said plaintiff was injured, bruised, maimed, and wounded about his head and divers parts of his body, and the said plaintiff thereby became and was lamed and crippled, sick, and disordered, and so continued for a long space of time, to wit, from then until the day of commencing this suit, and so is likely to continue, during all [of] which time the said plaintiff was, and still is, hindered from following his necessary avocation and affairs of business, and hath suffered much pain in body, and was, and hath been, forced and obliged thereby to lay out and expend a large sum of money in and about the curing and healing of his said bruises, hurts, sickness, woundings, and disorders, to wit, at the district and within the jurisdiction aforesaid to the damage of the plaintiff twenty-five thousand dollars;

And whereas also the said plaintiff heretofore, to wit, on the — day of June, in the year of our Lord one thousand eight hundred and seventy-nine, at Long Branch, within the district and jurisdiction aforesaid, was lawfully riding along a certain public street or highway called Brighton avenue in a certain carriage then and there drawn along said avenue, and while crossing the railroad then

and there laid, managed, operated, and controled by the receiver of the Central Railroad Company of New Jersey, duly appointed and empowered by the court of chancery of New Jersey to control, direct, and manage the said railroad, and then and there being upon the said highway or street, as the said plaintiff had the legal right to do, the said receiver, by his servants and workmen in this behalf, then and there so carelessly, negligently, improperly, and wantonly and without giving the ordinary signal, or any warning or signal whatever, governed, directed, and ran his locomotive-engine and train of cars upon his said railroad against, upon, and over the said plaintiff, as he, the said plaintiff, was lawfully crossing said railroad track upon said highway as aforesaid; that he, the said plaintiff, was thereby through the said careless, negligent, improper, and wanton act of the said receiver and his servants and workmen in that behalf injured, bruised, wounded, and disabled, and so hath continued and is likely to continue, and was thereby deprived of certain of his senses and suffered and continues to suffer great pain, and was hindered and prevented from performing and transacting his ordinary affairs of business and avocations; and also by
7 means of the premises by the said plaintiff was then and there forced and obliged to lay out and expend divers large sums of money in endeavoring to heal and cure the said bruises, wounds, and injuries, to wit, at Long Branch, in the district and within the jurisdiction aforesaid, to the damage of the said plaintiff twenty-five thousand dollars, and therefore he beings his suit, &c.

The said defendant, Henry S. Little, as receiver of the Central Railroad Company of New Jersey, by B. Williamson, his attorney, comes and defends the wrong and injury when, &c., and says that he is not guilty of the alleged trespass in said declaration mentioned, or any or either of them, in manner and form as alleged against them, and of this they put themselves upon the country.

And the said plaintiff doth the like.

Therefore let a jury come before the said court at the September term thereof, A. D. eighteen hundred and eighty-four.

And now, at this day, to wit, the twenty-fifth day of September, A. D. eighteen hundred and eighty-four, in the term aforesaid, comes before the said court as well the said plaintiff, by his attorney, as the said defendant receiver aforesaid, by his attorney, and the jurors of that jury, being summoned, also come, who, to speak the truth of the matter within contained, being chosen, tried, and sworn, upon their oath say that the said defendant receiver aforesaid is
8 guilty of the premises within laid to his charge in manner and form as the said plaintiff has within complained against him, and they assess the damages of the said plaintiff by reason thereof, over and above his costs and charges, by him about his suit in this behalf expended, to seven thousand dollars, and for these costs and charges to three hundred and fourteen dollars and eighty cents.

Therefore it is considered that the said James Hackett do recover against the said Henry S. Little, receiver aforesaid, his damages, costs, and charges by the jurors as aforesaid in form aforesaid assessed to the sum of seven thousand dollars, and also three hundred

and fourteen dollars and eighty cents for his costs and charges by the court now here adjudged to the said plaintiff, and with his assent, which said damages, costs, and charges in the whole amount to seven thousand three hundred and fourteen dollars and eighty cents; and the said defendant in mercy.

JOSEPH P. BRADLEY,
Asso. Justice.

Judgment signed this twenty-second day of October, A. D. eighteen hundred and eighty-four.

9 *Bill of Exceptions.*

In the United States Circuit Court, District of New Jersey, in the Third Circuit.

JAMES HACKETT
vs.
HENRY S. LITTLE, Receiver, &c. } Case —.

Peter L. Voorhees, Esq., Robert H. Hinckley, Esq., att'ys for plaintiff; B. Williamson, Esq., att'y for defendant.

Be it remembered that on the twenty-fifth day of September, A. D. 1884, at a circuit court of the United States for the district of New Jersey, in the third circuit, holden at the city of Trenton, in the said district, before his honor, Joseph P. Bradley, Esquire, one of the justices of the Supreme Court of the United States, and sitting as judge of the said circuit court for said district, the issue joined between the said parties in the above-stated cause (*pro ut* the pleadings) came on to be tried by a jury for that purpose duly empanelled, and thereupon the plaintiff gave evidence to show that he was in-
10 jured by reason of a collision between a carriage in which said plaintiff and a companion were riding, and an engine and train of railroad cars running on the New York and Long Branch railroad and operated by the employees of said defendant, as receiver of the Central Railroad Company of New Jersey, by which said last-named company, the New York and Long Branch railroad was held and managed under a certain lease, dated October 6, 1873; that said collision occurred at the crossing of the railroad over Brighton avenue, a public street of the village of Long Branch, in the State of New Jersey, and at a point known as West End Station, and that defendant's employees were negligent in omitting to give proper signals of the approach of said train to said public street.

The plaintiff also gave evidence to show that the vehicle in which he was riding was a public hackney carriage, which he had hired "to drive about from point to point," at a stand in front of a hotel in the town or village of Long Branch, and that the carriage was driven by the man from whom he hired it.

11 JAMES HACKETT, plaintiff, sworn in his own behalf, testified as follows:

Direct examination by Mr. HINCKLEY:

Q. Mr. Hackett, you are the plaintiff in this case?
A. I am, sir.
Q. What is your business, Mr. Hackett?
A. I am a freight solicitor for the Pennsylvania R. R.
Q. What is your present age?
A. 58, sir.
Q. In your own way, now, Mr. Hackett, tell the court and jury the circumstances attending the accident which happened to you on the 28th day of June, 1879?
A. On that day I went with Wholesale Grocers and Importers Association on an excursion to Long Branch, given to them by the Pennsylvania R. R. Co.; being a member of the association I went with them as such. After dinner I took a drive with a gentleman up and down the beach; we drove to the station and found that we had time; were ahead of time. I then proposed to drive further still, and we concluded to drive through Hoey's Park; the driver turned his horses and attempted to go there; just as the horses appeared to get on the track the gentleman who was with me jumped and called to me to jump. I was looking a different direction from
12 which the train was coming, and when I looked to see what he wanted I saw the smoke-stack just over my head.

By the COURT:

Q. As you started to jump?
A. Yes; the horses were headed towards New York; we drove up towards the end of the platform to get out; we found we had carriage to go over to Mr. Hoey's place—(Interrupted.)
time, and attempted to take a further drive; the driver turned his
Q. And as you were turning this thing happened?
A. After we turned—after we crossed the road.

By the COURT:

Q. Immediately afterwards?
A. Yes; the horses were at the end of the platform. The driver backed his horses to go back to Mr. Hoey's place on the other side—(Interrupted.)
Q. You had better show that on the plan, Mr. Hackett, how it was done.
A. The horses stood facing New York, standing this way (illustrating), right at the end of the platform; the driver had just got his horses turned around, and then drove right on out Brighton avenue to go to Hoey's. The horses were standing there—the end of the platform, where it meets Brighton avenue, and facing New York. We suggested to the driver to continue his drive.
13 He backed them around and then came this way (illustrating), right close to this platform, and came on into Brighton avenue. In attempting to get to Mr. Hoey's place we got caught.

Q. Which way was the train coming?
A. Coming from the north.
Q. You remember seeing the train?
A. No, sir.
Q. You remember hearing it?
A. No, sir.
Q. What was the first intimation that you had that the train was approaching?
A. The calling of the gentleman who was with me to jump.
Q. What did he say?
A. Nothing; only jump, and I saw that he did jump.
Q. Where were you looking at the time he made that remark?
A. I was looking down the track, sir.
Q. Do you remember what you had in your hand?
A. No; I do not, sir.

By the COURT:

Q. When you say "down," what do you mean?
A. I was looking from New York—looking south.
Q. When that remark was made what did you do?
14 A. I turned to see what was the occasion of his telling me to jump, and the first thing I saw was a smoke-stack right over my head.
Q. A smoke-stack right over your head?
A. Yes, sir.
Q. State, Mr. Hackett, whether or not you heard any whistle?
A. I did not, sir.
Q. Did you hear any bell ringing?
A. No, sir; no warning whatever.
Q. Was there any flagman at the station?
A. None that I saw, sir.
Q. Any flagman at the crossing?
A. I didn't see any if there was one there, sir.
Q. Now, tell the jury what happened. What was your state after you looked out and saw that smoke-stack? Do you remember anything further?
A. Nothing further; that was the last; I remember being hit, and recollect nothing further.
Q. When you next came to consciousness where were you?
A. At my house in Germantown.
Q. Have you any knowledge of how you got there?
A. No, sir.
Q. Now, can you detail to the court and jury in what condition you found yourself when you came to consciousness?
A. I was out of my mind; there were periods when I was
15 rational, but most of the time I wasn't responsible.
Q. Have you any remembrance of what you did during that interval?
A. Some incidents I remember, sir.
Q. Just detail them to the court and jury—just exactly what you

remember concerning your condition during that time, what you did and what you raved about, or anything that you remember.

A. Well, I took a great aversion to my wife, would not like her to come into the room; I took a great aversion to my doctor; refused to take the medicine he offered me; I was very anxious to go to business; I wasn't able to walk, but would insist on them bringing my clothes that I might go to town on business.

Q. That is, you insisted on going when you were not able to walk?

A. When I wasn't able to walk.

Q. What was your feeling towards the attendants who waited on you?

A. Intense aversion.

Q. Have you any recollection, and what, touching your removal to the insane asylum near Frankford?

A. I was cajoled to take a drive to identify some person who was one of my companions, and I remember being taken into a
16 certain room and waiting for this gentleman to come; while waiting, the gentleman who accompanied me disappeared; I rose to depart, and found no knob on the door, and behind iron bars.

Q. How long did you remain in that institution?

A. Nearly two months, sir, I think.

Q. Under whose particular care while there?

A. Dr. Hall.

Q. Do you remember the date of your discharge?

A. The first of September.

Q. 1879?

A. 1879.

Q. Did you resume business then?

A. Only partially, sir; I went to the office for a few days; after that I went up in Pennsylvania, back to the Delaware Water Gap, for two or three weeks.

Q. Were you discharged the first of September, 1879?

A. Yes, sir.

Q. When you returned to Philadelphia did you resume active business at that time?

A. No, sir; not my usual—(Interrupted.)

Q. Not your usual business. Did you then go [to] the Water Gap?

A. Yes, sir.

Q. How long did you stay there?

A. About three weeks.

17 Q. What was your object in going there?

A. To try to recuperate.

Q. At the end of the three weeks' visit to the Water Gap what did you do?

A. I came back to Philadelphia.

Q. What was your condition then?

A. Very feeble.

Q. What did you undertake to do in regard to business?

A. I undertook to do more than I was really able to do, which retarded my recovery to some extent.

Q. You spoke of being feeble; how long did that feebleness continue?

A. To the present day, to some extent.

Q. Well, to what extent does it exist, Mr. Hackett—your feebleness—in comparison to your condition before the accident?

A. I havn't the same amount of endurance, sir; nothing like as much; I havn't the same vim that I had.

Q. Are you able to walk as much?

A. No, sir.

Q. What has [been] the effect on your mental powers, Mr. Hackett?

A. I don't know that my mental powers are impaired to any extent, except my memory; my memory is not as good as it was.

Q. Can you undertake very fatiguing mental exercise as you did before?

18 A. Not without producing severe headaches.

Q. What is the effect, Mr. Hackett, upon your senses?

A. It has left me without the sense of taste or smell.

Q. Just explain fully to the jury, Mr. Hackett, what you mean by that—" without the sense of taste or smell."

A. Nothing has flavor; acid makes an impression on my mouth—burns my mouth—castor oil hasn't different flavor than sweet oil, nor has carbolic acid any flavor different from cough syrup.

Q. Have you any particular incident which you could tell the jury to illustrate the difficulty in that respect?

A. About eighteen months ago I was taking a cough syrup, and it became misplaced and got on the washstand where Mrs. Hackett had been using carbolic acid as a disinfectant; it was in a bottle the same shape and the same size and the same color; not looking at the label [I] took up a spoon, which lay beside it, and poured out a spoonful of the carbolic acid and swallowed it.

Q. What was the effect?

A. My wife ran instantly and got some sweet oil and gave me—I suppose about a wine-glass full—and attempting to give me more I fell on the floor exhausted.

Q. And physicians called in?

A. Dr. Nancried; Dr. Porter subsequently attended me.

Q. Now, Mr. Hackett, you have spoken of the taste; just
19 tell the jury something in regard to the sense of smell; how it affects you by its absence.

A. If vapor was passed under my nose I could tell there was something there, but what it was I couldn't tell; I couldn't tell the difference between a vapor from cologne and a vapor from asafœtida; I would know it was a vapor, but what it was I couldn't tell.

Q. Is any bad smell pervaded the atmosphere would you be conscious of it?

A. No, sir.

Q. What was your business at the time of this accident?

A. I was agent of the National line, that is one of the Pennsyl-

vania fast freight lines, and also freight solicitor for the Pennsylvania R. R. proper.

Q. Agent for the National line, which is a fast freight-carrying line?

A. It was then, but it is now merged into another line.

Q. And also freight solicitor for the Pennsylvania R. R.?

A. Yes, sir.

Q. What compensation did you receive for those services?

A. I don't remember the exact figures; it was about $3,000 a year.

Q. For both services—agent for the National line and freight solicitor for the main line of the Pennsylvania R. R.?

20 A. There has been a reduction of certain percentages.

Q. Do you know anything, Mr. Hackett, in regard to your promotion being impeded by the accident?

A. I had been promised promotion from time to time——

Q. (Interrupted.) You were in the line of promotion at the time of the accident, and been promised it?

A. Yes, sir; it had been.

Q. What effect had the accident on it?

By Mr. WILLIAMSON:

Q. On what?

A. It stopped—prevented it.

Q. Is Mrs. Hackett here?

A. Yes, sir.

Q. Where is she?

A. She is in the clerk's room.

Q. Will you just tell the court and jury what you are engaged at now?

A. I am freight solicitor for the the Pennsylvania still, and one of the freight solicitors for the Union line, into which the National line was merged.

Q. That is, you are occupying about the same position as you did before?

A. Just about the same duties.

Q. At the time the accident happened, Mr. Hackett, were

21 you engaged in any enterprise to increase your income?

A. Yes, sir.

Q. What was the character of the enterprise?

A. Purchasing and selling stocks.

(Objected to; objection overruled; exception taken.)

Q. Mr. Hackett, to remove any doubt in the mind of my friend, Chancellor Williamson, will you just state the character of the institution of in which you said you were under Dr. Hall's care—just tell the jury what you know about it?

A. It was styled the Friends' Asylum.

Q. For the treatment of what diseases?

A. Insanity.

Q. Situated at Frankford, near Philadelphia?

Q. Yes, sir.

Q. How long were yo in that institution, did you say?

A. Nearly two months. I went there in July and came out in September.

Q. When you were sitting in the carriage before the accident took place, Mr. Hackett, tell the jury as to your ability to see up the track, or anything of that kind—anything which obstructed the view—do you remember anything at all of that?

A. Not at that time.

Q. You don't remember anything at that time?

A. No, sir.

22 Q. When you went there subsequently, Mr. Hackett, was the depot the ticket office, was it the same size as it was when you were there during the accident?

A. I don't remember that, but it was very shortly after. I made a visit to Long Branch as soon as I got able to travel about.

Q, As soon as you were able to walk you made a visit to the scene of the accident?

A. Yes, sir.

Q. Well, what did you see there at that visit?

A. I saw from the position we were in that it was impossible to see a coming train from New York.

Q. Did you put yourself in the position that you remember being before the accident took place?

A. Exactly, sir.

Q. That is, you mean where you were sitting in the carriage?

A. Where I was sitting in the carriage.

Q. That is the point you indicate on the plan?

A. Yes, sir.

Q. And you say you endeavored to look up the track towards New York.

A. Yes, sir; and we couldn't see past the station-house an incoming train.

Q. What was to block the view?

23 A. A number of carriages in front of us waiting for the trains coming and the station-house.

Q. A number of carriages and the station-house, anything else.

A. — I know of, sir.

Q. What was the name of the driver of the carriage?

A. Joseph Brown.

Q. Who was the owner of the carriage?

A. Mr. Layton.

Q. Did you hire the carriage?

A. I did, yes, sir, at the West End Hotel.

Q. Hired the carriage at the West End Hotel. It was an ordinary Long Branch team standing there for hire?

A. Yes, sir.

Q. And you hired it to drive about from point to point?

A. Yes, sir.

Q. Mr. Joseph Brown had charge of the carriage?

A. He was the driver; yes, sir.

Q. He drove for Mr. Layton?

A. Yes, sir.

Q. Do you recall about the time that you reached the West End station, when you were driving, just before the accident?

A. It was a few minutes before five.

Q. Few minutes before five?

A. Or about five; the exact time I don't know.

24 Q. You had time before the train came to take you home, and you thought you would occupy that hour?

A. By extending the drive into Mr. Hoey's garden.

Cross-examination by Mr. WILLIAMSON:

Q. Were you coming home in the same excursion train that you took down to Long Branch?

A. Yes, sir.

Q. What time was that to leave Long Branch?

A. At six o'clock.

Q. What time did you arrive at Long Branch that day?

A. I don't remember the time; we left Philadelphia at eight o'clock; at least I didn't leave; I got in at Germantown Junction.

Q. Well, did the excursion train go any further than Long Branch?

A. No, sir.

Q. It stopped there?

A. I don't knew where the train went; the passengers got out at West End.

By Mr. VOORHEES: What train was that, Chancellor?

By Mr. WILLIAMSON: The excursion train that stopped there.

25 Q. Did you go as a free passenger?

A. No, sir; I am a member of the Wholesale Grocers' Association, and we all gave our proportion.

Q. It was an excursion on their part?

A. It was an excursion on their part.

Q. It was an excursion from Philadelphia to Long Branch?

A. Yes, sir.

Q. And the West End was the stopping place?

A. The West End Hotel was where they dined.

By the COURT:

Q. Was there any particular friend with you?

A. Mr. Stokes was with me, sir.

Q. What is his first name?

A. John.

Q. Where from?

A. Philadelphia—Germantown.

Q. Is he here?

A. Yes, sir.

Q. You say you got in where?

A. Germantown Junction.

Q. Germantown Junction; was Mr. Stokes with you when you got in—start with you?

A. I think he did; he was invited at my suggestion.
Q. Invited to go with you?
A. Yes, sir.
26 Q. What is his business?
A. In the same office with me; freight solicitor for one branch of the Pennsylvania railroad, and also for the Union and National lines.
Q. And how long have you been there together?
A. Several years.
Q. After you arrived at Long Branch, did you go with him?
A. (Interrupting.) We all went to the hotel. (Interrupting.)
Q. When you got to the West End and got out, did you go in company with Mr. Stokes to the hotel?
A. I don't remember.
Q. Did you meet him after you left the West End?
A. We sat together at the dinner table.
Q. You say—(Interrupted)——
A. At the dinner table.
Q. Hadn't you seen him before going to dinner?
A. I think likely.
Q. What time did you take dinner?
A. I don't remember what time we sat down to dinner.
Q. Was it after two o'clock?
A. It was in the afternoon.
Q. After two o'clock?
27 A. We got up from the dinner table and took this carriage together.
Q. You say you went out and entered that carriage about four o'clock. Didn't you engage that carriage and ask a gentleman to ride with you?
A. Yes, sir.
Q. Who went with you in the carriage?
A. Mr. Stokes.
Q. Where did you go?
A. We went up the beach and then down the beach as far as General Grant's cottage, I think.
Q. Did you go to the iron pier?
A. I think we did.
Q. Did you get out there?
A. I don't think we did.
Q. Did you get out anywhere from the time you got in the carriage at West End until the accident happened?
A. Not to my recollection.
Q. And how long was it, according to your recollection, between the time you left the West End and the time of the happening of the accident?
A. That I don't remember; we drove up the beach and down the beach. (Interrupted.)
Q. Was it a half hour?
A. I suppose it was fully that.

Q. Well, did you hire the carriage for any particular time?
28 A. I don't remember the bargain at all, sir.
Q. But you went to the West End station for the purpose of taking the train?
A. Yes, sir.
Q. Did you pay for the carriage?
A. That I don't remember, sir.
Q. Don't you remember of taking out your pocket-book when you were in the carriage to pay the man that was driving the carriage?
A. I don't remember taking my pocket-book out, sir, there at all.
Q. Don't you remember taking your pocket-book out while you sat there in the carriage? How long did you remain there waiting for the train?
A. Only a short time, sir.
Q. Who spoke first about going to Mr. Hoey's?
A. I don't remember, sir, who suggested it.
Q. You don't?
A. No, sir.
Q. Do you recollect what was said about going to Mr. Hoey's?
A. Nothing more than we thought we had plenty of time to drive there and asking the driver if he could get us back in time to meet the train.
Q. That was all that was said about it, was it?
29 A. All that I remember.
Q. You hadn't paid him for taking you down to the West End station?
A. I don't remember.
Q. You don't remember whether you took out your pocket-book to pay him; you don't remember that?
A. No, sir.
Q. Is there any particular reason why you shouldn't remember a fact like that?
A. There was no particular reason.
Q. Now, you have told us about all that was said about going to Mr. Hoey's, have you?
A. That is all I remember.
Q. There was no contract made about going to Mr. Hoey's?
A. Contract with whom?
Q. With the driver of the carriage.
A. I don't remember.
Q. And all that you remember about going to Mr. Hoey's you have stated?
A. That is all that I remember, sir.
Q. Now, you have said that you went there again in the fall; in what month did you go there?
A. I don't remember, sir.
Q. This was in the month of June; didn't you go there in the early part of September?
A. No, sir.
30 Q. Was it in October?

A. I don't remember, sir; it wasn't until I recovered my strength sufficiently to go.

Q. Well, it was in the fall?

A. In the fall.

Q. Who went with you?

A. I think I went alone.

Q. Did you ask Mr. Stokes to go with you?

A. I don't remember.

Q. You went alone? How long did you remain at Long Branch?

A. I don't remember that; I don't think over a day, sir.

Q. What did you go there for?

A. Just to see the premises where I was hurt.

Q. What time of day did you leave home?

A. I don't remember that, sir.

Q. Do you remember how many nights you stayed away from home?

A. I don't.

Q. Did you go directly from your home to Long Branch?

A. I did, sir.

Q. You certainly stayed there over one night?

A. I think I did, sir.

Q. Don't you remember staying two nights?

A. I don't remember.

31 Q. When you left Long Branch, where did you go to?

A. Philadelphia.

Q. To your home in Germantown?

A. I went to wherever I was living.

Q. Who did you go to see, if any one in particular, at Long Branch?

A. If I had an object in going to see any one there it was Mr. Layton, the owner of the carriage.

Q. The owner of the carriage? What was the name of the driver of the carriage?

A. Brown.

Q. Had you seen him at any time between the time of the accident and the time of your going to Long Branch?

A. Joseph Brown?

Q. The driver.

A. Yes, sir.

Q. Where?

A. In Philadelphia.

Q. When?

A. Some time in the fall; either in September, October, or November.

Q. Was it early in September?

A. I don't know, sir.

Q. Was it in October?

A. I don't know, sir.

32 Q. Was it before you went to the asylum?

A. It is since I came from the asylum, decidedly.

Q. Now, when did you come from the asylum?

A. The first of September, 1879.
Q. Was it within a week after that that you went down?
A. No, sir, because I went back to the Water Gap and stayed there until the first of October.
Q. Was it immediately after that?
A. I don't think it was.
Q. Where did he see you?
A. At my room in Walnut street.
Q. Did he come on purpose to see you?
A. Yes, sir.
Q. How long did he stay with you?
A. Half an hour, probably.
Q. Was there any other object of his visit except to talk with you with reference to this accident?
A. No, sir.
Q. Did he bring any letter from his employer?
A. Not that I saw.
Q. Did you get any letter from him?
A. Mr. Layton?
Q. Yes.
A. I had a number of letters.
33 Q. When was the first letter?
A. I don't remember.
Q. Well, was that in the fall, too?
A. That I don't remember.
Q. Well, was it before or after you saw Brown?
A. That I don't remember.
Q. Hadn't you written to him before you saw Brown in reply to letters which he had written to you?
A. I wrote to him first.
Q. That was before Brown came to see you?
A. I don't remember.
Q. Didn't you expect Brown?
A. I sent for him.
Q. Sent for him by letter?
A. No, sir; I think my wife called at his father's house.
Q. At Long Branch?
A. In Philadelphia.
Q. Called at whose father's house?
A. At Brown's father's house.
Q. Was Brown living in Philadelphia?
A. I think he was, sir.
Q. Had you known him before this accident happened?
A. I never saw him before.
Q. Do you know how long he had been living in Philadelphia?
[A.] ——
34 Q. How did your wife find out that he was living there?
A. By the directory; we went to a number of houses where people lived by the name of Brown, and finally found out which was the one.

Q. She was looking in the directory for him and found him in the directory?

A. Yes, sir.

Q. Now, what led her to suppose that Brown lived in Philadelphia?

A. Because I was notified by Mr. Nieman that the name of the driver was Brown, and that he lived in Philadelphia. I had written to Nieman to find out who was the owner and who was the driver.

Q. Mr. Nieman was a dispatcher down at Long Branch?

A. He is the agent, I believe.

Q. What time in the fall was it that you wrote to Nieman?

A. I don't remember that, sir.

Q. Well, how long after you came from Frankford?

A. That I don't know, sir.

Q. Very soon?

A. I think it was very soon.

Q. Did you write him more than one letter?

A. I wrote him two.

Q. What was the purport of those letters?

35 A. One was to ask him for the information, and the other that I hadn't received the information asked for.

Q. It was to enquire where Brown could be found?

A. To ask him who the driver was and who the owner was.

Q. He gave you the names?

A. Yes, sir.

Q. After your wife found where he lived what did she do?

A. She went to see if he was the man. The first time I saw him was when he came to my house.

Q. Very soon after?

A. I think it was.

Q. And he stayed a half an hour?

A. I don't know, sir; it may be a half an hour and it may be more; he came and I had an interview with him.

Q. How long after you saw Brown was it that you went down to Long Branch?

A. That I don't know, sir.

Q. Did you see Brown at Long Branch?

A. No, sir; Brown wasn't there.

Q. But you saw Mr. Layton. Did you stay with Layton?

A. No, sir; I stayed at the Central Hotel.

Q. Who went with you to examine the premises?

A. Layton.

Q. Any one else?

36 A. Not that I remember, sir.

Q. You have stated, I believe, that the hack drove up to the platform—that is, on the east side of the platform—so that the horses' heads were towards New York, from which the train came; now, what was said and done from the time you drove up to the platform until you started, as you say, to go to Hoey's?

A. Nothing that I remember of but that we had time enough to

take a further drive, and it was suggested by some [one] that we drive into Hoey's grounds.

Q. That some one was Brown or Stokes——(Interrupted.)

A. Or myself.

Q. Who was it?

A. I don't remember.

Q. Then the driver backed his horses—he backed his horses in the direction to go to Hoey's, and then started to go over Brighton avenue?

A. Yes, sir.

Q. Now, you hadn't heard anything about the train coming, then?

A. Not a word.

Q. And the first you saw of it was the stack of the engine?

A. Yes, sir.

Q. Where were the horses, then, when you saw that stack?

37 A. That I don't know, sir; they must have been on the track.

Q. Can you say whether they were or not?

A. No, sir.

Q. Now, when you saw that stack hadn't Mr. Stokes jumped out of the carriage?

A. He had, sir.

Q. He had jumped out of the carriage when you saw the stack?

A. Yes, sir.

Q. And the carriage was going and the train was going?

A. Yes, sir.

Q. You say that he spoke to you?

A. Called to me to jump—called out distinctly. I was sitting on the left side. He jumped and cleared the track. I didn't jump out because I didn't observe the train till too late. When he called out, I turned. Had I jumped out I would have jumped on the locomotive.

Q. Now, when within a foot or three or four feet of the track there was no difficulty then about seeing for a train a great distance, was there?

A. I don't recollect.

Q. You drove here (illustrating), and you crossed over the Central and the Southern roads; do you remember that?

38 A. Yes, sir.

Q. You remember that very well?

A. Yes, sir.

Q. And you went down here (illustrating)?

A. No, sir; I didn't go that way; went about here (illustrating).

Q. Had you when you turned into the side of the platform—had you just come up Brighton avenue from the hotel—from the direction of the sea; you came up from the sea towards the station and turned right alongside of the platform?

A. Yes, sir; we were going towards the west and turned by the side of the platform.

Q. When you turned alongside of the platform the horses heads were towards New York?

A. Yes, sir.

Q. And the train that you were struck by came from that direction?

A. Came from that direction.

Q. Now, what I want to know is did the horses—did the driver turn the horses—back the horses, and then go across?

A. Yes, sir.

Q. In backing he must have gone towards the railroad?

A. No, sir; he went towards the sea.

39 Q. Now after he had backed out, did he have any trouble in backing the horses?

A. None that I remember.

A. After he had backed out and his horses were going towards Mr. Hoey's, and before he went on the track, was there any trouble in seeing that train for one hundred yards?

A. Couldn't see the train coming.

Q. What was to obstruct you?

A. That station-house.

Q. Couldn't you see it that far—was there any obstruction in looking from there to there (illustrating on plan)?

A. This 100 feet?

Q. Was there any superstructure for 100 feet?

A. Not that I remember.

Q. Now, can you explain how it is that Mr. Stokes jumped out of the carriage to save himself from the train and that you and the driver, Brown, didn't see the train?

A. I wasn't on that side, nor was I looking in that direction. I was on the west side and looking south.

Q. Now, was the driver seated on a seat higher than the carriage?

A. Higher than we were sitting.

Q. What, if Mr. Stokes could see the train so as to jump out and save himself, *what* prevented the driver from seeing the train?

40 A. I don't know, sir; the only thing that I know about it is that I didn't see it. I was looking in different direction until Mr. Stokes called to me to jump.

Q. Now, do you remember on which side of the carriage Mr. Stokes jumped out?

A. On the right.

Q. When the train was coming?

A. Yes, sir.

By the COURT: Q. That is, he jumped out on the north side?

A. Yes, sir.

Q. On the east side of the road?

A. Yes, sir.

Q. You say the driver's seat was a high seat?

A. Yes, sir.

Further cross-ex.:

Q. You say you didn't see the train, because you were looking south; that is the reason you didn't see the train?

A. That is the reason. I would not have seen it if it had been in full view.

Q. And you didn't see the smoke-stack until Mr. Stokes jumped out?

A. No, sir; I didn't see it until Mr. Stokes jumped out
41 and called to me to jump.

Q. You say that you were receiving then as compensation for the business from both companies?

A. I think that is it.

Q. What do you mean by "I think?"

A. It may be a few dollars less than that, and possibly a few dollars more.

Q. That is what you mean?

A. Yes, sir.

Q Fixed salary?

A. Yes, sir.

By the COURT: I understood him to say that the salaries had been raised a little by percentages which he received; he couldn't remember the exact amount, but the salaries had been raised by some percentages?

The WITNESS: Raised.

Further cross:

Q. How long before that had they been raised?

A. I don't remember, sir.

Q. Well, some time?

A. Yes, sir.

Q. In consequence of the pressure on business?

42 A. I don't remember why, but I got notice that my salary was to be so much.

Q. When was it that you tried the experiment of the acid?

A. About eighteen months ago.

Q. Well, the fact of your swallowing the acid wasn't in consequence of the accident that happened to you, as I understand?

A. The accident where?

Q. At Long Branch.

A. Well, if I could have smelled or tasted it I wouldn't have swallowed pure carbolic acid; that can be smelled at a long distance.

Q. When was that?

A. Eighteen months ago.

Q. Well, at that time were you aware of the fact that you had lost your sense of smell?

A. Yes, air.

Q. Well, would not that fact have induced you to be more careful?

A. I ought to have been more careful.

Q. Were you less careful in consequence of that accident?

A. No, sir.

Q. What effect did the taking of that acid have upon?

43 A. I was sick for some time afterwards.

Q. Did it burn your month?

A. Decidedly, sir.

Q. And your stomach?

A. Yes, sir. I was affected by the consequences of taking it for some time afterward.

Q. Now, with regard to your taste. Do you take your breakfast every morning?

A. Yes, sir.

Q. And your dinner every noon?

A. No, sir. I don't take dinner until six o'clock.

Q. You take it as you always did?

A. I take it at the regular time, sir.

Q. And you take your lunch?

A. Yes, sir.

Q. And you are hungry as usual?

A. My appetite varies.

Q. You enjoy a good dinner just as much as ever you did, don't you?

A. I enjoy it; — benefits—satisfies my appetite.

Q. And drinking champagne now and then and sherry wine—which do you like best?

A. It don't make a bit of difference.

Q. That you don't consider a disadvantage?

44 A. No, sir; mere inconvenience not to have a preference.

Q. And you don't know the difference between a glass of water and a glass of champagne.

A. Yes, sir; one has an impression upon the mouth different from the other.

Q. Don't the champagne taste different?

A. It don't taste at all.

Q. What difference do you notice about —?

A. No difference, except the impression on my mouth.

Q. Well, now, don't you take your drinks for enjoyment?

A. No, sir. Sometimes I take a glass of wine as a sentiment.

Q. You have no sense of smell at all?

A. No, sir; the smell of one thing is just the same as another.

Q. How were these faculties before the accident?

A. Very acute.

Q. Both of them?

A. Yes, sir.

Q. That is all.

Q. Mr. Hackett, do you remember, sir, whether at the time Stokes said "Jump," whether or not the carriage was in motion at that time?

A. The carriage was in motion.

Q. That is all.

45 Recross-examination.

Q. And I think you said the horses had not reached the track?

A. I don't know, sir.

Q. You say the driver's seat was higher than the main seat of the carriage?

A. Yes, sir.

Q. How many seats were there behind the driver's seat—were there two?

A. I think there were two seats, sir.

Q. How much lower was the seat on which you and Mr. Stokes sat than the seat of the driver?

A. I should suppose—of course I took no special interest in then—but I suppose it was a foot.

Q. You could see over that seat at a distance; the seat didn't prevent you from looking over?

A. That I don't remember; I remember the seat was higher, sir, because in talking he would turn around.

Q. You say the driver wasn't hurt?

A. I don't know; I was insensible to everything after I was hurt.

Q. What kind of a carriage was it?

A. I don't remember; it was an open carriage.

46 Q. Had a top just covering the back seat, which you could put down?

A. I don't remember.

Q. That is all?

Recess.

47 Jos. W. Brown, a witness produced on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Hinckley:

Q. Mr. Brown, what is your business now?

A. Driver—coachman.

Q. On your own account or are you employed by some one?

A. I am employed by the United Cab and Carriage Company, 817 Jayne St., Philadelphia.

Q. You are now, then, driving carriage in Philadelphia?

A. Well, I am not driving now, of course; I am a driver.

Q. Where were you driving carriage in June, 1879?

A. Long Branch, New Jersey.

Q. Do you remember the plaintiff, Mr. Hackett?

A. Yes, sir.

Q. How long had you been driving carriage at Long Branch—how many seasons?

A. Three.

Q. The season of 1879 was your third season?

A. The third season.

Q. Who was your employer?

48 A. Beniga Layton.

Q. Now, will you tell the court and jury the kind of carriage you were driving in the season of 1879?

A. It was what we call a barouche.

Q. How many seats had it in it?

A. Two behind, and one in front for the driver.

Q. Well, was the driver on a level with the passengers or above the passengers?

A. About two feet above the passengers.

Q. That is, the seat of the driver was about two feet above the seat of the passengers?

A. Yes, sir; about two feet above.

Q. Now, how many passengers would your carriage carry?

A. Well, it would carry four behind and one up alongside of the driver, making five.

Q. Your carrying capacity was five, four in the carriage and one up alongside of yourself, making five?

A. We generally carried four, five is an overload.

Q. How many horses did you have?

A. Two.

Q. Now, what kind of horses were they that you had in June, 1879—were they sound and kind?

A. Yes, sir; sound, as far as I know, and both kind; the color color was—(Interrupted.)

49 Q. Never mind that. Now, Mr. Brown, will you tell the court and jury, in your own way, your connection with Mr. Hackett in June, 1879, and all that you know about the accident which took place?

A. Well, there was an excursion from Philadelphia at the West End Hotel—at least, I heard there was an excursion—and I drove in there to try and get somebody to drive around, and Mr. Hackett, the gentleman there (pointing to plaintiff), he came out and engaged me; he was by himself, and came out and engaged me to drive him around Long Branch. I was to drive him around Long Branch for $1.50, and go through Hoey's Park for fifty cents extra, if we had time. Well, I started with him and another gentleman and drove up Ocean avenue (interrupted)——

Q. Did they both get into the carriage together?

A. Well, that I can't say.

Q. Well, go on, now.

A. Well, I drove up Ocean avenue—that is, north—as far as the East End Hotel, turned, and came down to the pier. The Plymouth Rock was just about landing, and we stopped to see the passengers get off; we didn't stop long; saw the band get off and a few other people. Then we drove to the Bryant Cottage, and turned there and came to the West End depot. Well, just before I got to

50 the depot they wanted to know about the time. Mr. Hackett mentioned about the time and about going to the park—Hoey's Park. I kept driving on till I got to the station; pulled up to the station, at the corner; didn't get quite stopped. Mr. Hackett made the remark about having plenty of time. I remember him having his watch out, and about taking the extra drive into Hoey's Park; so, instead of turning around, I backed my horses (interrupted)——

At this point the court adjourned until Friday, the 26th day of September, 1884, at the hour of ten o'clock in the forenoon.

51 JOSEPH W. BROWN:

In my testimony of yesterday I spoke of Grant's cottage; from there went north on Ocean avenue to Brighton avenue, down Brighton avenue to State, pulled up to the station and Hackett spoke of going to Hoey's property. I backed horses around to go there and headed them toward the track. I looked down the track and up the track, and then started to cross by driving down; I looked south and saw nothing, and then started; horses got on the track and jumped; that is the last I knew; I was struck and thrown against Hoey's gates, or nearly there, on the west side of the tracks; lines got wrapped around my hands and drew me a little way from the carriage. When I got loose I followed horses west, up Brighton avenue; horses got across the track. When I rose to my feet I was knocked about 15 feet to west of track. After I ran a little way after horses I came back to the carriage. I saw Hackett lying near Hoey's gate. I got one of my blankets and threw over him. He was bleeding at [his] nose and mouth. I got one blanket and threw over him. I took one of [the] cushions of [the] carriage to put under his head; whether I put it under his head I am not sure about that. I looked up and down the track; I could see down to Cedar ave., and north I could see, I guess, about 100 yards to the ticket-box. I could not see beyond the ticket-box; — was a stage there,

52 and the ticket-box and some freight cars above the station and ticket-box. The freight-cars were near the west End Ave.; could not say what track they were on at that time. The siding was on the east side of the track beyond ticket-box, near West End Ave. Before we drove up to platform, Mr. Hackett said nothing then; he had his watch out, and said [he] had time to take extra drive. Didn't wait for more. I was anxious to take extra drive. I looked up and down the track and heard no bell or whistle; I saw no flagman there; always had been a flagman there. I didn't see him that day; he was not there when I went to cross. The track there is on a down grade from New York. I didn't hear the noise of the train nor any bell or whistle at that station, can't say where they ordinarily stopped. I don't know where this locomotive stopped that struck me. I was at station not over 10 seconds—not any longer than that. I never saw the locomotive. I didn't see the man in the carriage when locomotive struck me; they were both in carriage when I started to cross the track. There was an entrance into Hoey's garden on the other side of track. I had right to enter; there was open entrance; had gates to it. Brighton Ave. is a place of considerable driving. A great many go in and out of Hoey's there. I was black and blue; hurt pretty bad on one side. I don't know whether that train passed on.

53 Cross-examination:

I didn't know that it was time [for] this train to come up, and I was not expecting it; I don't know whether that was the time for [the]

train to come; the carriage — on the east side of [the] platform; I supposed that [the] proper place to stand; carriages stop all along the station; no other place for passengers to get in carriage from platform, that I know of; I drove to [the] platform to make [it] easy for Hackett and Stokes to get on; I looked for [the] train after they told me they wanted to take extra drive; after they told me they wanted to take extra drive I looked down and up the track; up towards New York; down towards Elberon; I saw nothing. In looking up the track carriages might have obstructed sight; stages were there; the side platform seemed crowded with stages; can't say whether many or few people — on platform; there were some people there; I can't recollect the number; there were cars on siding; I guess three cars; the siding was — — east side — — railroad, above the West End avenue; I saw some 2 or 3 cars; they were box-cars, not platform cars; after I got my horses I took my team around them; I don't recollect that other person spoke about going to Hoey's; Hackett spoke first about going at the W. E. Hotel when he hired me; not *spoke* again of this until we got to [the] platform;
— the horses — up to [the] platform, but not carriages; I
54 was not quite stopped when something — said about going to Hoey's. He said he had time to take extra drive. I made bargain to take — up and down Ocean Ave. for $2, and if in Hoey's to give 50 cents more. I don't know that Hackett had pocket-book in hand when I drove to platform. Hackett told me to go to Hoey's. There was a carriage near the horse's head along the platform. I didn't drive up as near to the other carriage as usual. I had hardly stopped when I started to go to Hoey's. I looked up and down to see if any train —. I drove down Ave. to platform; the platform was to a point at that time. I drove in to let them out; I didn't drive in far enough; I didn't quite stop. I backed the horses out, keeping face towards N. Y. When I backed out and looked for the cars, got horses over and was hit. I didn't see freight car until I took horses back. I was on west End Ave. when I saw freight cars; I was on the east side, and I looked up east side. You can't see anything on west side. I could see to the ticket office and in front of the ticket office, not beyond it. I don't know that I have been there for the purpose of seeing how far I could see a train sitting on carriage-box. When I backed horses out, I looked to see train; can't say that — can see 150 feet beyond ticket office. When I backed the horses I was close to [the] ticket office. I had to look over stage; always accustomed to look for danger. I looked; I didn't see any danger. I looked and could not see through
the carriages. I didn't have to get out in B. Ave
55 to get across the track. After I drove to Brighton avenue I looked to see if [a] train [was] coming. I was at end of platform; not nearer than that to the track. I had been driving those horses about two weeks. I had been employed by Layton two seasons before that. I can't say when Layton got possession of horses. They were good horses, so far as I knew. One was not a troublesome horse to me. Layton didn't say one of them was afraid of cars. When on Ocean ave. stopped at pier. I didn't get out and take

horses by head. I didn't work much about horses; didn't say, when [I] went to depot, anything about horses being frightened by cars, or about getting out of way. I have seen the ticket office at W. E. station, built on platform; it is enclosed building. I could see beyond the ticket box on west side. I could see across the lots. At that day the stages were there. I could see to ticket office. That is as far as I could see north. The carriage was struck on hind wheel. It touched hub. Only hind wheel struck. I can't say whether at that time there were two tracks in front of the platform across Brighton avenue.

LEWIS H. ROSEBURY sworn:

In June, 1879, I was baggage master and switch tender and tending to matters around West End station. I was on hand to attend switch on southern road. I had flag; had no orders
56 to use. I had flags then, but never used them. I received no instruction to use flags. I remember accident to Hackett at time train came in on that day; had a high wind from west; blew ticket box down in office; I was helping Kline put up tickets. The train was behind time 10 or 12 minutes. I looked up and saw nothing. I was in there picking up tickets. Train came by and ran on down beyond station; I ran down for baggage 2½ cars below Brighton avenue; I took baggage, off 25 or 30 pieces. The train was coming pretty fast, 12 or 15 miles an hour. My duty was to handle baggage; ordinarily the train discharged the baggage on platform at south end; to do that the engine was on north side of Brighton ave., clear of the road altogether. It was against orders for engine to stand across avenue.. The locomotive on the train stopped more than 2½ cars south side of avenue. It threw the baggage out there and I had to get [the] baggage in sand. I didn't hear bell or whistle or nothing until [the] train ran by and I ran down to get baggage. There is a little down grade from N. Y., not very heavy. After I went down and received baggage I saw [the] crowd. I saw Hackett; some one carried him back to station. I got him water. After a little while train went on towards Sea Girt. Were two tracks on New Jersey road at time of accident. They laid other track while I was there; not sure before or after the [accident]. I am [al]most certain [there] was two tracks there. I don't remember whether [there was] any blood on Hackett when I saw him.

57 Cross-examination:

I live in Easton. I lived there four years at time of accident. I was switch-tender and baggage-master, and assistant to Kline, to assist him [in] whatever he wanted to be done. I didn't remember statement as to accident. I didn't state to that man that I heard [the] whistle. I went there in May or June, and stayed to last part of September. I was there for the season. I am [al]most positive there was double track at that point in that summer. They generally run the right-hand track that day. I think the baggage was over the track. I don't think they ran over Brighton avenue a dozen times

that summer. I think G. Luffer was engineer. At that time didn't run over the ave. I think the train that day was 8 or 9 cars. That train, I think, had express cars, baggage cars, and six or seven passenger cars. That was express train. Regular time due was 4.55. Arrived there after five o'clock. I don't know how many minutes behind time. At five o'clock hadn't come. Excursion train of grocers was the largst train run on that road. Excursion train was Penn'a train. The accident done by Central R. R. train. I think train ran to Sea Girt; don't know, but believe so.

JOHN O. KLINE sworn:

In June, 1879, I went to W. E. station, June 10, as ticket agent, in employ of Central R. R.; had express train on Long Branch
58 road, due at station at 4.55. I remember accident to Hackett. I remember the day [it] occurred, June 28, and at W. E. station. I was in ticket office. I think [I] was a few minutes late; I can't tell how many. The ticket office was [a] frame structure, enclosed, built on platform. There was space of four or five feet between station and R. R. track; it was about 15 feet or 20 feet high from surface of the platform. The first intimation I had the train was coming there was its rushing into the depot. I didn't hear any whistle or bell telling its approach. This expresss train, as a general thing, didn't run across Brighton ave., and on other occasions, but not generally, didn't go across B. ave. I knew of instruction that they should not blockade any crossing. Brighton ave. is much used for driving during the season. I didn't know of flagman particularly employed to flag there; flagged this when he could. When Roseberry had time [we] flagged train; when [he] hadn't we didn't; always expected to look for trains; the locomotive which caused accident stopped down near the switch of the Southern R. R. There is a slight grade of track there from N. Y. Mr. Roseberry, ass't then at [that] time; when train arrived he was in office helping me. I saw Hackett first; saw him lying with blanket over him. After train moved on [he] was brought into waiting-room; he was bleeding very much; sent for physician; he was unconscious; he was taken back on a stretcher or bed brought over from Hoey's, and he started for Philadelphia. This train
59 was coming pretty quiet. I can't tell whether running with steam on or off would make less noise if steam off.

Cross:

I can't say whether I called Roseberry in office. He was there helping me put up the tickets. We closed door to put up tickets when train passed. Was but one track there at the time; other being built. Roseberry was my assistant under my direction. We both attended to flagging when not otherwise engaged. There is a public house on Brighton ave., about 2 squares away. Not in employ of R. R. Co. now. I left there at close of season. I entered in their employ in fall of 1882. No connection now with the R. R. Co. It was an express train; generally run 8 or 10 cars. I have seen fifteen cars. Can't say about this train.

Re-examined in chief:

They were working a new track at time. I think was finished about July 4. The track being built was the west track, the south-bound track; the cars causing the accident were on the track nearest station.

60 MAITLAND GARDNER, a witness produced on the part of the aforesaid plaintiff, being duly sworn according to law, on his oath deposeth and saith:

Direct examination by Mr. HINCKLEY:

Q. Where do you reside, Mr. Gardener?
A. At Long Brach.
Q. How long have you resided at Long Branch, Mr. Gardner?
A. I was born in that vicinity, near Branchburg.
Q. What was your occupation in June, 1879?
A. Working on the street.
Q. Whereabouts?
A. Long Branch.
Q. Do you remember the accident that has been testified to here?
A. Yes, sir.
Q. Where were you at the time it happened?
A. On Brighton avenue, just to the west side of the railroad track.
Q. About how many feet from the crossing of the railroad?
A. In the neighborhood of one hundred and fifty feet, I suppose. I couldn't say positively as to that. It was very close by.

61 Q. You saw the accident?
A. Yes, sir.
Q. Did you see the carriage before the accident?
A. Yes, sir.
Q. Where did you first see the carriage?
A. I saw it come across Brighton avenue, across the Southern road, and pull in near the end of the station.
Q. How long did it remain at the end of the station?
A. Hardly time to think.
Q. Then what direction did it take?
A. It backed down and started to come across the track.
Q. Well, what happened to the carriage?
A. It was struck by the engine and torn all to pieces.
Q. Were both men in the carriage injured?
A. No, sir.
Q. What became of the one that was not injured?
A. He jumped out.
Q. Did you see him jump?
A. I did, sir.
Q. Where was the carriage when he jumped?
A. The horses were about on the track; the carriage was just near it.
Q. On which side of the railroad were you standing?
A. On the west side.

62 Q. Did you see the train coming?

A. Yes, sir.
Q. Had you a clear view of it down the track?
A. Yes, sir.
Q. Did you hear any bell or any whistle?
A. No, sir.
Q. Do you know what time it was?
A. In the neighborhood of five o'clock.
Q. Was the train on time?
A. It was said thereafter that it wasn't on time; that she was behind a little. Not being accustomed to the road, I couldn't say for myself. It is only hearsay.
Q. How was the train going as to speed?
A. Well, running very fast. I couldn't say whether within their limits or not, but she was running very fast, indeed.
Q. Did the locomotive stop at the station or go on.
A. She run considerably beyond.
Q. Across Brighton avenue?
A. Yes, sir.
Q. Did you see any flagman there at the crossing?
A. No, sir.
Q. You say the carriage drove to the West End station and stopped there barely time to think?
A. Hardly time to think.
63 Q. Do you know whether or not it was possible to have a clear view of the track from that point where the carriage was?
A. Well, sir, if you will let me explain. After the accident I went down and saw the gentleman lying there, and I started then, knowing all about it, to let the man that owned the horses know about the accident. As soon as I could get across the track from the crowd I started down to the gentleman that owned the horses, and I took him and went straight back as soon as I could to take care of his things. In the meantime he said we had better take a view of the track from here to see if we could see down the track north or not. I turned my horses, and from the end of the station to West End avenue, probably two hundred feet, and beyond West End avenue there were two or three box cars——(interrupted.)
Q. On the siding there?
A. Yes, sir; and from where the carriage stood we could not see by for the station, but stepping back 15 or 20 feet to the eastward you could see through a vacant place from the ticket office to West End avenue; otherwise there was lumber piled on H——'s field, and the train and the box cars cut off the view north.
Q. Did you drive Mr. Layton to where you saw the carriage stop before the accident?
64 A. Yes, sir; and got out of the wagon, both of us.
Q. Sitting in your wagon, how far up the track could you see from that point?
A. Only to the ticket offices; probably a hundred feet; it wouldn't amount to anything.
Q. You saw Mr. Hackett, the man who was injured that day?

A. Yes, sir.
Q. What was his condition when you saw him?
A. He was in pretty bad shape then.
Q. Was he bleeding?
A. He was lying on his back and blood running out of his mouth.

Cross-examination by Mr. RICHEY:

Q. (Showing witness a map.) Have you seen this map?
A. No, sir; no more than what I have seen here.
Q. You haven't examined it at all?
A. No, sir.

(Council proceeded to explain the map to witness.)

Q. Now you say you were on the west side of Brighton avenue?
65 A. Yes, sir.
Q. About 150 feet on Brighton avenue?
A. Yes; I stood on Brighton avenue.
Q. Where did you see this train coming first from where you stood?
A. Between Bath avenue and West End avenue.
Q. Is Bath avenue further north than West End avenue?
A. Yes, sir.
Q. Had you seen this carriage when you first saw the train?
A. No, sir; they were about approaching at the same time; the carriage drove in over the southern road about the same time the train came in sight.
Q. The carriage stopped here at this platform? You had seen the train coming when they were crossing the railroad?
A. Yes, sir.
Q. Were you looking at them at the time or was it accidental?
A. My attention was drawn towards them.
Q. Before they drove into the depot?
A. By his twisting his horses and backing down I supposed he was trying to cross the track, and I made up my mind there would be a collision if he did, for you see the station and track is all right on top of one another.
66 Q. If he stood here (indicating) where did the other carriage stand?
A. Up near the ticket-office.
Q. Look at the map, please.
A. I can't tell anything about that.
Q. Now, when they stood here (indicating) could any carriage stand before them as they looked up the track?
A. (Witness here explained on the map the direction the carriage took down Brighton avenue across the southern road to the platform, &c.)
Q. Now, then, when they backed their horses and approached the track could any carriage obstruct their view between them and the railroad?

A. All he had was from here to here (indicating); he couldn't see back this way.

Q. Answer my question, if you please, whether any of those carriages that stood here east of the platform could obstruct his view of the tract when he was about crossing it?

A. No; because his horses would be on the track; the wagon would touch the platform and his horses on the track.

Q. After he had backed out and got even with the end of the platform is there a position in which a carriage could get to obstruct the track; if he looks up the track, could a carriage get so as to obstruct his view?

A. No, sir; not there, because there is not room enough.

67 Q. No carriage could obstruct his view of the track while about crossing Brighton avenue?

A. No, sir; right there is where the man jumped out.

Q. You saw that and saw the carriage go on?

A. Yes, sir.

Q. That platform is over one hundred feet long between the ticket office and Brighton avenue; that has been proved here.

A. I didn't measure it.

Q. Do you know how wide the platform is along the side of the ticket office next the track; is it not some four or five — wide?

A. Probably wider.

Q. Then, in looking over the platform and between the ticket office and the track, that vacant space, was there anything there to obstruct the view?

A. I could not say that. There may have been people standing there. There were lots of people on the platform.

Q. Wasn't he some four or five feet above the ground on his box?

A. Yes, sir.

Q. Would it not carry him over the heads of the crowd sitting on the carriage box some seven feet above the ground and then looking north between the ticket office and the platform and the

68 track; was there anything to obstruct his view sitting up there?

A. No, sir; unless as I said before the people obstructed his view.

Q. What obstructed your view on the west side of the track from seeing up there a thousand feet as you looked north, on the west side of the railroad in Brighton avenue; what obstructed your view?

A. Where I stood I could see to the Long Branch station.

Q. How far is that?

A. From the West End station to the Long Branch station?

Q. Was it half a mile?

A. Probably it is; I couldn't say.

Q. Is it in the neighborhood of half a mile?

A. I could not say; somewhere thereabouts.

Q. So that if you had looked in that direction you could have seen the train coming all the way from the Long Branch station?

A. Yes, sir.

Q. When you first saw it, then, how far was it from you before

they attempted to cross the track; before you saw them back out how far was the train north of the station?

A. Somewhere about Brighton avenue; on the move altogether.

69 Q. We want to know where you saw the train coming?

A. I saw it near Brighton avenue.

Q. That is before they attempted to cross the track?

A. I was near Brighton avenue and the train was near Bath avenue; that is the first avenue from West End avenue.

Q. Now, do you know the distance between those two avenues?

A. No, sir; I do not; probably 300 feet.

Q. Then after you saw that at the avenue that you speak of you looked across and saw them back out and drive up and come across the track?

A. Yes, sir.

Q. Then after the accident you didn't stop to look after the injured, but the moment you saw it was Mr. Layton's horses you ran to his place?

A. I stopped and saw the man lying there.

Q. You didn't remain there, but went to inform Mr. Layton of the accident?

A. Yes, sir.

Q. And then you and he came back?

A. Yes, sir.

Q. Where was Mr. Hackett?

A. I didn't go to see him; he was there in the depot with a crowd around him.

70 Redirect examination by Mr. HINCKLEY:

Q. This platform, is it covered or not from Brighton avenue to the ticket office; is it covered?

A. There is a station there and a shed over it.

Q. How far does the shed extend from the ticket office towards Brighton avenue?

A. I think it extends all the way to Brighton avenue.

JOHN O. KLINE, a witness previously called and sworn on behalf of complainants, being recalled, testified as follows.

Further direct examination by Mr. HINCKLEY:

Q. This platform, is it covered or not from Brighton avenue to the ticket office?

A. It is covered.

Q. Do you know where this carriage stopped before the accident?

71 A. I didn't see it.

Q. Do you know the point?

A. Yes, sir; I know where it is.

Q. Standing at the end of the platform where the carriage stopped, how far up the track towards New York can you see?

A. You couldn't see through the ticket office, of course, and you could not see any further than that, unless you got on the track.

Q. On the track?

A. Right on the edge of the platform; because the distance between the edge of the ticket office and the edge of the platform was only four or five feet.

Q. That's all.

Re-cross examination by Mr. WILLIAMSON:

Q. Is there any obstruction to seeing two or three hundred feet from there (indicating)?

A. Up on top of the carriage you could not see that far.

Q. Why not?

A. Because the ticket office is in the way; because the building is in the way.

72 Q. What building?

A. The ticket office.

Q. The ticket office is not in the way there?

A. There (indicating) is the ticket office.

Q. Now, what is to prevent your seeing far beyond on the track?

A. You can see beyond.

Q. How far?

A. On the edge of the platform you might see—— (interrupted.)

Q. No, not on the edge of the platform.

A. Well, I say you could not see that track because the track was right on the depot.

Re-direct examination by Mr. HINCKLEY:

Q. Did you try it?

A. I should have tried it; I was there one whole summer and know every inch of the ground.

Re-cross examination by Mr. WILLIAMSON:

73 Q. Do you mean you got on the box of the carriage to see?

A. No, sir; I wasn't on a box.

Q. What do you mean, then, by saying that?

A. I mean to say that I have often been on the platform, and you couldn't see very far, and being on a carriage you could not see at all, because the roof would be in the way. The roof of the platform would be in the way.

Q. If it is fifteen feet from the platform could there be any obstruction?

A. The platform wasn't fifteen feet.

Q. From the platform to the top of the roof is 15 feet?

A. No, sir; I didn't say that; I didn't say the platform is fifteen feet high.

By the COURT:

Q. How high is that roof on the platform?

A. It is not as high as the ticket office.

Q. No, but how high is it?

A. About ten feet, I should judge.
Q. There was no siding on the roof—nothing but posts?
A. That's all.

Further recross-examination:

Q. And you think the roof was ten feet high?
A. Yes, sir.
74 Q. Now, sitting in a carriage by the platform, how could the roof, if it was ten feet high, be any obstruction to looking up the track?
A. I didn't say that.
Q. You do not mean to say now, on reflection, that the roof would be an obstruction in looking up the track?
A. I said it might be.
Q. Sitting in a carriage at the side of the platform, would a man's eyesight be as high as if he was standing on the platform?
A. If you were on the seat of the carriage?
Q. On the driver's seat?
A. Naturally higher than if you were standing on the platform.
Q. His head would?
A. Certainly.
Q. Then it is about two feet high?
A. About that on that side. (Indicating.) On the other side it is almost even with the track.
Q. Is not the platform nearly two feet high on Brighton avenue, where this carriage passed along?
A. No, sir; it is on the east side.
Q. Where the carriage stood, is not the platform very nearly two feet high, so as to take two steps to go up?
75 A. There are no steps there. It is so you can step up comfortably; about one and a half or two feet high.
Q. From the platform to the eaves of the roof, how high is it, if you know?
A. I should judge about ten or twelve feet.
Q. Suppose it is eleven, then add the eleven to the two, and you would have thirteen feet from the ground to the eaves of the platform?
A. Yes, sir.
Q. Now, then, did you see this carriage?
A. No, sir; I did not.
Q. Take an ordinary carriage; is it not about five feet from the ground to the seat?
A. Yes, sir.
Q. Take the height of a man sitting on his seat, say two feet more, making seven; now, would he not have four or five feet between the range of the eye and the eaves of the roof to see up the track?
A. Yes, sir; I suppose he would if he looked—if he was standing on that side.
Q. I am asking you now on Brighton avenue.
A. He wasn't on Brighton avenue.

Q. Adjoining the platform—I am speaking where Brighton avenue runs along the end of the platform?

A. At the end of the platform there wasn't any height at all, because it runs right out on the ground.

76 Q. The end of the platform is level with Brighton avenue?

A. Yes, sir; one step there.

Q. Suppose we say one foot there then (interrupted)——

A. I said at the end of the platform running down the railroad.

Q. No, I am speaking of the platform south, right in Brighton avenue. Suppose you were going to step from Brighton avenue up on the platform; is there no elevation there?

A. There is one step there.

Q. After he backed out from the platform, turning his horses to drive over—you say there is one step there?

A. There is one step there and, I suppose, two or three feet more of boards, which was even with the ground.

Q. Do you call that [a] platform?

A. Well, yes.

Q. Is that the continuous platform from the ticket office that you spoke of?

A. Yes, sir.

Q. Where is that step that you speak of?

A. It used to be at the bottom of the platform.

Q. Well, even if that step was there, and then the height to the eaves of the roof, would not the driver have some three or four feet clear to see up the road?

77 Yes, sir, if he was at the end of it, but not under it.

Q. What difference would it make?

A. Because the ticket office was at the end of the platform.

Further redirect examination:

Q. Sitting in a carriage at the end of the platform, how far up the track could he see from the end of the platform, before the carriage got on the track, or before the horses got on the track?

A. He could not see up at all before the horses got on the track, on account of the station, before he gets onto the track.

Q. To see all the way up the track, then, he must get on the track?

A. Almost on the track, because it is only a matter of a few feet between the station and the railroad track.

Q. Would it make any difference whether the gentleman was sitting in the back of the carriage or on the driver's seat?

A. Only a difference of two feet.

Q. The same construction would stop the view up the track?

A. I should think so.

78 Q. Were there many passengers standing around at the time of this accident?

A. Yes, I think so; it is generally a heavy train for that station.

Further recross-examination by Mr. RITCHIE:

Q. Do you mean to say there were many passengers standing there to take that train?

A. I didn't say so; I said they were generally there waiting for passengers, because it was an express train from New York.
Q. Do you remember how it was then?
A. No; they never had many passengers going south from there.

WILLIAM H. TOLLMAN, a witness produced on behalf of the aforesaid plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. HINCKLEY:

Q. Where do you reside?
79 A. Long Branch.
Q. Were you there in June, 1879?
A. Yes, sir.
Q. Do you remember the accident that has been testified to here?
A. Yes, sir.
Q. Where were you at the time of the accident?
A. On Brighton avenue.
Q. How far from the scene?
A. I never measured it; I should judge about 150 feet.
Q. On which side of the track?
A. The west side.
Q. Did you see the train coming that caused the accident?
A. I did, sir.
Q. How [was] it in regard to speed?
A. It was coming very fast.

By the COURT:

Q. Were you with Mr. Gardner?
A. I was, sir.
Q. Did you hear any bell or whistle?
A. I did not, sir.
Q. What were you doing there, Mr. Tollman?
A. I went to meet the man that employed me.
80 Q. Were you waiting for the particular train?
A. 4.50, 54, or 55; I don't know which it was.
Q. Well, you say that you saw the train coming; did you hear any whistle blown or bell rung?
A. No, sir.
Q. If a bell had been rung or a whistle blown, would you have been likely to hear it?
A. I should think so; I was looking right up the track.
Q. Did you see the carriage that the accident happened to?
A. Yes, sir.
Q. Where was it when you first saw it?
A. In front of the building that is there; Cavanaugh's hotel it was called at that time.
Q. Was it coming along Brighton avenue?
A. Yes, sir.
Q. It was driving, was it?
A. Yes, sir.
Q. Did you see it stop at the platform?

A. I saw it pull into the platform, but if it stopped it stopped such a short time that I didn't notice.

Q. What did they do then?

A. Backed right around and attempted to cross the track.

81 Q. You saw the train coming, did you, at the time?

A. Yes, sir.

Q. You were on the west side, you say?

A. Yes, sir.

Q. Did you see a man jump out?

A. Yes, sir.

Q. Where were the horses when you saw the man jump out of the carriage?

A. Just raised and stepped over the first rail of the track; just on the track.

Q. Where was the train of cars at that time?

A. Past the ticket office—that is, the building that is closed.

By the COURT:

Q. You mean the locomotive?

A. Yes, sir; right about even or past; it wasn't north of it at all.

Further direct examination:

Q. And then it was you saw this man jump out of the carriage?

A. Yes, sir.

Q. Could the driver have escaped with his team?

82 A. The only way was to get over before the train reached him. That is the only way I would have tried if I had been the driver.

Q. Did you see Mr. Gardner standing there?

A. Yes, sir. I drawed his attention about the train coming in running still; I think he will remember.

Q. You mean running quietly?

A. Yes, sir.

Q. From where the carriage stood when you saw it go to the platform, could you give us any idea of how far up they could have seen; either the driver or the gentleman in the carriage?

A. That I could not say positively. I never tried to see how far I could see from there.

Q. Do you know whether the steam was on the train or not when you say it was going quietly? Was it puffing or blowing?

A. No, sir; I didn't hear any.

Q. You don't know whether the steam was on or not?

A. If it had been on I think I should have heard it. I heard no noise whatever.

Cross-examination by Mr. RITCHIE:

Q. In what direction was your carriage standing?

83 A. My horse's head was headed towards the depot—east.

Q. You stood, then, lengthwise with Brighton avenue?

A. Yes, sir.

Q. About 150 feet away?

A. I didn't measure it; I should judge it was about that distance.

Q. Is the track as it approaches Brighton station a perfectly straight track?

A. No, sir; I think not.

Q. Do you know?

A. Yes, sir; it winds a little to the west in going towards Long Branch station.

Q. In coming from Long Branch station it winds little to the west?

A. A little to the east that way. I think the West End station is a little bit further west than the Long Branch.

Q. Is it a straight line or a curve between Long Branch and the West End station?

A. I never took notice to see.

Q. Whether it is a curve or a straight line?

A. As long as I have been there I couldn't tell.

Q. Where did you see the train first?

A. After it had passed Bath avenue.

Q. That is the second avenue from Brighton?

A. Yes, sir.

84 Q. Was not a strong west wind driving against the train as it came?

A. I have no recollection of the wind.

Q. You can't tell us about that?

A. No, sir.

Q. Where did you see the team after you saw the train at Bath avenue?

A. In front of Cavanaugh's hotel.

Q. Is that east or west of the New Jersey Southern railroad?

A. That is east of the New Jersey Southern.

Q. Now, where was this train when you saw this carriage coming up Brighton avenue east of the New Jersey Southern railroad?

A. It had just passed Bath avenue.

Q. How far did the carriage drive from that hotel up to the platform; what is the distance?

A. I could not say positively how far it is.

Q. You can tell us something about the distance they had to come from the hotel across the New Jersey Southern up to the platform; now, what is the distance?

A. I have no idea.

Q. Fifty or a hundred yards? Give us some idea.

A. Well, it is not over a hundred yards.

85 Q. Now, after you saw the train at Bath avenue coming towards Brighton station the carriage drove up to the platform from where you saw it?

A. Yes, sir.

Q. And then backed, and the horses were turned over?

A. Yes, sir.

Q. Where must the train have been when the horses struck the track?

A. The engine was by the ticket office when the horses attempted to cross the track.

Q. Do you know the description of this carriage that Mr. Hackett was in?
A. It was a barouche.
Q. It was a top over the hind seat?
A. I won't say whether it was over the hind seat or both seats.
Q. It was a calash top, to let down?
A. Yes, sir.
Q. There was nothing to obstruct the view of those in behind—there was no partition between the inside of the carriage?
A. No, sir; no curtains.
Q. It was an open view, then, only the driver's seat higher?
A. Yes, sir.

86 Q. Now, was there anything to obstruct the view from where the driver sat on his box when the horses were just approaching the track—to intercept the view of the engine along the side of the ticket office?
A. Between Brighton avenue and the ticket office?
Q. Yes.
A. There was nothing there only a few people, but if he saw it at that time he hadn't time to get his horses off the track.
Q. Well, never mind that. I merely wanted to know when the driver had turned back his horses into Brighton avenue; you say that the engine was even with the ticket office; now, was there anything to obstruct his view if he had looked alongside of the ticket office?
A. I haven't been there to see.
Q. Do you know of anything?
A. I don't know of anything without the platform roof did, not after his horses was on the track.
Q. When he was at the end of it, I mean, before they crossed the track?
A. Before they crossed? There wasn't no train there then, when he stopped there.
Q. I asked you if there was anything to obstruct his view if the engine had been even with the ticket office, on the track; was there anything to obstruct his view?
A. No, sir; not that I know of. Of course, I haven't been there and looked to see.

87 BENAJA LAYTON, a witness produced on behalf of the aforesaid plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. HINCKLEY:

Q. Mr. Layton, where do you reside?
A. Long Branch, New Jersey; Monmouth county.
Q. How long have you lived there?
A. About thirty years, I think, sir.
Q. What is your business, Mr. Layton?
A. I used to keep a hotel there.
Q. What else did you do besides keeping a hotel?
A. I run carriages and stages.

Q. Just explain to the court and jury what you mean by running carriages.

A. I mean to say I kept them for hire; what they call hacking there.

Q. Was Joseph Brown one of your hackmen?

A. Yes, sir.

Q. And drove one of your teams?

A. Yes, sir.

Q. When was he in your employ; how long has he been in your employ, and when?

88 A. He was in my employ in 1879.

Q. In the month of June?

A. Yes, sir.

Q. Had he authority then to hire out the team that you gave him?

A. Yes, sir.

Q. Do you remember the team that he drove in June, 1879?

A. Oh, yes, sir.

Q. Did you own the team that was injured in this accident to Mr. Hackett?

A. Yes, sir.

Q. What was the character of the horses?

A. Well, they were a pretty nice pair of horses—good pair of horses.

Q. Had you given Brown any special instructions how to drive them, and so on?

A. No, sir; nothing more than to be careful with the horses, which I always told the drivers.

Q. Do you remember the accident; did you see it?

A. No, sir; I didn't see it.

Q. Were you on the ground shortly afterwards?

A. Yes, sir; I suppose in twenty or twenty-five minutes afterwards; I couldn't say the exact time.

Q. Did you see the point at which the carriage stopped before it was struck—the end of the platform?

89 A. I had it pointed out to me.

Q. By whom?

A. By the driver.

Q. This Mr. Brown?

A. Yes, sir.

Q. And who else?

A. Well, I don't know. I believe Mr. Hackett told me that was about the place, as near as he could recollect, or something like that, and Mr. Gardner likewise.

Q. Can you describe the surroundings of that station—the platform and the ticket office and the cover to the platform?

A. Yes, sir; partially so, I should think, now. Mr. Gardner came down to let me know about my team and carriage, and I got up there as soon as I could. The first thing I done I looked to see after this man that got hurt. I didn't know him at the time.

Q. This Mr. Hackett?

A. Yes, sir. I saw him laying there on one of my blankets. I

think he was there then; there was such a terrible crowd around him. I saw blood on his face, and I saw he had plenty of friends, or plenty around him; so then I went looking after the carriage. In the mean time I told Mr. Gardner it would be well for us to look and see what show a driver had to get across at such a time
90 as that. We took a view of the station. At the end of the platform, at the north end, there seems to have been a lot of freight cars there.

Q. On the side track there?

A. Yes, sir; at the north end of the platform. To the best of my judgment, as I looked at it, if a man undertook to cross the track there he would have but very little notice to see anything coming.

Q. Did you try it?

A. I did; yes, sir.

Q. What was the result?

A. You could see up—it was all owing to where you stood. When you were swinging around the team, that brought the ticket office in view; then to put the horses across the track you could see nothing above the ticket office till the horses were about on the track.

Q. From the location that Mr. Brown showed you he backed his horses, what was the view of the track?

A. Very poor, sir.

Q. What stopped the view up the track from that point?

A. The ticket office. But when I got there the platform was full of people.

Q. Did the people or the ticket office stop the view?

A. The ticket office would stop the view, to a certain extent, as I said before.

91 Go back to the point where Brown told you he backed his horses; from that point what view could he have up the track?

A. A very slight distance beyond the station.

Q. What is the distance from the horses' heads to the seat where the driver sits?

A. I should think about fourteen or fifteen feet; I never measured it, but that would be my judgment.

Cross-examination by Mr. RITCHIE:

Q. Mr. Layton, you say that you were the owner of the team?

A. Yes, sir.

Q. And Mr. Brown was your driver?

A. Yes, sir.

Q. You felt that you had an interest in it, I suppose? You had a pretty big interest if it was the carelessness of your driver that injured Mr. Hackett?

A. Yes, sir.

Q. Now, where was your carriage when you came around there?

A. It was laying along Mr. Hoey's gateway.

Q. Where were your horses?

92 A. I couldn't tell you; I didn't see them.

Q. Your man Brown hadn't got down home yet when you went around there?

A. Oh, no, sir.

Q. Did you try to get that view that night?

A. I did, sir.

Q. Did you get up in the carriage to view the height of where he sat on the box?

A. No, sir; I don't think we were quite as high; we were in a farm wagon.

Q. You say you saw a crowd of people there?

A. Yes, sir.

Q. The people, I suppose, that had come in on the train?

A. I can't say whether from the train or the excursion.

Q. Was it a large excursion that day?

A. I could not say.

Q. How long had you owned these horses?

A. I got them that spring some time.

Q. Hadn't you charged Brown to be careful with them because one of them was very much afraid of the cars?

A. No, sir; I charged him in this way: That they were good lively drivers and (interrupted)——

Q. Do you know whether they were afraid of the cars or not?

A. Nothing more than any other good lively team would
93 be; nothing unmanageable or ugly about them.

Q. Do you mean to say that a horse, if lazy, won't care for the cars, and, if he is a lively, spirited horse, he will?

A. There is a difference in them.

Q. Has it anything to do with the spirit of the horse—their fear of the cars?

A. I could not answer that question. There are some horses you can make all the noise you have a mind to, and they won't mind it, and others would be afraid of any noise.

Q. Was not one of these horses more than usually afraid of the cars?

A. No, sir; I think not.

Q. Now, tell us where you saw these cars standing; whether they were not away west of West End avenue?

A. Oh, no.

Q. Now, show us on this map?

(Counsel proceeds to explain map to witness.)

A. I shall not undertake to give evidence by the map, because I am not very well posted. The cars stood on the side track to the north end of the station.

Q. The north end of the platform of the station?

A. Yes, sir.

Q. Then if the platform extended here, to West End avenue, the cars were still north from that.

94 A. If it does, but (interrupted)——

Q. Well, give us your recollection at that time?

A. My recollection is the cars stood south of West End avenue.

Q. Was there any turn-out there?

A. There was [a] switch there; yes, sir; I believe; I am not very well posted on railroads.

Q. Then your impression is that it was south of West End avenue?

A. No, sir; I haven't said so.

Q. South of West End avenue—you just said so?

A. Oh, yes; the cars were backed up near the end of the platform. It is south of West End avenue.

Q. Was there ever a turnout or switch south of West End avenue, adjoining the railroad?

A. Yes, sir; unless they took it up very lately. I think it is there yet, to-day.

Q. Brown remained with you that summer?

A. Yes, sir; a portion *so*. It crippled my horses so that they were not used any more that summer, but he probably was there two or three weeks after that.

Q. Has he ever worked for you since?

A. No, sir.

Q. Then some two or three weeks after this accident Brown left, and has never worked for you since?

95 A. No, sir; I hadn't any work for him since.

Redirect examination:

Q. Where was this carriage broken?

A. Well, it was [a] general smash-up. Apparently the train struck the hind part and racked it all up.

Q. You think the engine struck the hind part of it?

A. Yes, sir; I should think so; it is a general wreck.

Q. Brown never applied to you for employment, did he?

A. No, sir.

Q. You did not discharge him because of this accident?

A. No, sir. I had no carriage to drive the team to, and in fact the team was disabled and not fit to drive.

The papers heretofore referred to by plaintiff's counsel and the plan of the scene of the accident were at this point offered in evidence by the plaintiff's counsel.

96 JAMES HACKETT, the plaintiff, having been already called and duly sworn in his own behalf, was recalled for further direct examination by Mr. HINCKLEY:

Q. What was the amount of your physician's bill?

A. $400.00.

Q. That included your board in the insane asylum?

A. Yes, sir.

Q. That's all.

(Not cross-examined.)

Plaintiff rests. (Recess one hour.)

97 After recess Mr. Ritchie, on behalf of the defendants, proceeded to move the court for a nonsuit, on the ground of con-

tributory negligence on the part of plaintiff's agent, the driver. His remarks were interrupted by the court with the statement that in the United States courts it was not the practice to take case from the jury, as was sometimes done in State courts, and that if defendants' counsel insisted upon their motion they would be precluded from offering any other defence.

The motion was thereupon discontinued, and ex-Chancellor Williamson opened the defence.

EDWARD TRAVIS, a witness produced on behalf of the aforesaid defendants, being duly sworn, testified as follows:

Direct examination by Mr. RITCHIE:

Q. Where do you reside, Mr. Travis?

A. Long Branch.

98 Q. And have for how long a time?

A. Ten or twelve years.

Q. What has been your occupation there?

A. Part of the time on the railroad and part of the time on a hack.

Q. How long have you been driving a hack?

A. Five seasons.

Q. Five years—that is, during the summers of five years?

A. Yes, sir.

Q. Where—to what point?

A. Every direction; every direction that I was asked to go, sir.

Q. Is it a hack of your own?

A. Yes, sir.

Q. And you own the team?

A. Yes, sir.

Q. State whether you have been accustomed to go to the West End station.

A. Yes, sir; more or less; occasionally.

Q. Are you acquainted with the different avenues there—West End, Brighton avenue?

A. Yes, sir.

Q. And West End avenue?

A. Yes, sir.

99 Q. Now, where do the carriages stand when they bring passengers to the depot or come for them to take them from the depot at the West End station?

A. Go right alongside of the east side of the platform.

Q. In crossing over Brighton avenue at the south end of the platform, now state what view you have of the railroad north.

A. I should judge I can see about sixty feet from the corner of the platform.

Q. Corner of the platform or corner of the ticket office?

A. Corner of the platform at Brighton avenue, 60 feet north of the depot.

By the COURT:

Q. From the corner of the platform at Brighton avenue—(interrupted).

A. Sixty feet from the station; yes, sir.

Further direct:

Q. Here (indicating) is Brighton avenue, and here is the end of the platform here; there is the ticket office. Now, standing here (indicating), how far can you see in a northerly direction on the track?

A. Standing at the end of the platform and Brighton avenue?

Q. Yes.

100 A. I can see sixty feet from that point (indicating), and the other side of the depot.

Q. Sixty feet the other side of the depot?

A. Yes, sir; north of it; clear of the depot.

By the COURT:

Q. At the east corner of the platform?

A. Yes, sir.

Further direct:

Q. What kind of a carriage do you drive?

A. It was a barouche, with half top, and now I have a three-quarter top on it.

Q. What kind of a carriage did Mr. Layton own that Brown drove?

A. Well, as far as I can recollect, it was the same kind of a carriage that mine was.

Q. When the top was thrown back it was the same as an open carriage?

A. Yes, sir; all open in every direction.

Q. When the top was pulled over how far would it go over those sitting in the hind seat?

A. Clear back of their heads, if they had a mind to put it down low.

Q. You say yours is the same?

A. Yes, sir; it is the same pattern.

101 Q. How high is it from the ground to the driver's seat?

A. Five feet four inches; that is, to the top of the driver's seat, not including the cushion.

Q. What is the width of the cushion?

A. Well, the cushion that I sat on in front is not as broad as the ones inside.

Q. No, but the thickness of the driver's cushion?

A. A couple of inches.

Q. That would make it from your seat to the ground five feet six inches?

A. Yes, sir; that is as close as I can get to it.

Q. Then sitting on the seat five feet six inches from ground, what kind of a view would you have up the road across this platform?

A. As I said awhile ago, when I came to the edge of that platform I could see sixty feet north of the depot.

Q. Have you tried it?

A. Yes, sir; I have.

By the COURT:

Q. Sitting on the seat, on the east side of the platform?

A. Yes, sir; or standing on the platform, either.

Further direct:

Q. You have tried that?

102 A. Yes, sir.

Q. Then, at the point, if you should stop your horses here in Brighton avenue, and look up, you could see sixty feet beyond this passenger depot on the track?

A. Yes, sir.

Q. When did you try it?

A. Last night.

Q. How came you to go last night; were you asked to go?

A. I was hired.

Q. You were asked to be a witness, and went to examine?

A. Yes, sir.

Q. Now, when you sit here (indicating) on your driver's seat five and a half feet above the ground, how could you see under the covering over this platform, or did the covering interfere with your view at all?

A. It don't interfere at all, sir.

Q. How many feet above the range of your sight were the eaves of the covering of this platform?

A. I should think three or four feet.

Q. Above?

A. Yes, sir.

Q. So, sitting there, there was no obstruction till sixty feet beyond the ticket office of the passenger station?

A. Yes, sir.

103 Q. At that point you could have seen a train coming here (indicating) if you had looked?

A. Any man could see it if he looked?

Q. Was you there at time of the accident?

A. No, sir.

Q. You don't know anything at all about it?

A. No, sir; nothing at all.

Cross-examination by Mr. HINCKLEY:

Q. You say you went there last night; who did you go there with?

A. What night?

Q. Last night. Didn't you say you tried it last night?

A. Yes, sir.

Q. Who went with you, Mr. Travis?
A. I don't know as I know his name; Mr. Marsh, I think.
Q. That is the gentleman who hired you to go?
A. The gentleman that hired the carriage.
Q. What did he say to you when he hired you, Mr. Travis?
A. He didn't say anything at all to me.
Q. How did you know to drive to Brighton avenue?
A. He told me to drive there.

104 Now, whereabouts did he stop the carriage? Just show me on the map where you stopped the carriage and took the view that you speak of.

A. We drove right alongside of the depot; right there. (Indicating.)
Q. With the carriage standing there did you try the view?
A. No, sir.
Q. Well, where did you go when you first tried to look?
A. We backed right around.
Q. Backed out into Brighton avenue?
A. Yes, sir.
Q. Where did you go then?
A. Right to this corner. (Indicating.)
Q. That is the lower corner of the platform; you stood there, you say?
A. Yes, sir.
Q. Now, where else did you go?
A. Didn't go anywhere else.
Q. You just took that view from there?
A. Yes, sir.
Q. What time in the evening was it, Mr. Travis?
A. I should think about seven o'clock.
Q. Was it dark?
A. Dark—yes, sir.

105 Q. Well, did you see any particular object beyond here (indicating) that you could fix sixty feet beyond?

A. Yes, sir.
Q. What was it you saw?
A. Two railroad bars. A man went back with a red light.
Q. Then you stood here until you saw a man with a red light go back.
A. Yes, sir.
Q. Now where was the man with the red light?
A. On the railroad track.
Q. On which one of the two here?
A. On the one next the depot.
Q. Now, he walked backwards and carried the light?
A. Yes, sir.
Q. You say you could see him the length of two railroad bars?
A. Yes, sir; I saw him standing there myself. Then he went back with a white light, and then I went back two bars or a little over and saw two men walking on the platform.
Q. That was all done with a red and white lantern?

A. Yes, sir. If you could see with lanterns you could see in the daytime.

Q. Was the man carrying the lantern in his hands?

A. Yes, sir.

106 Q. You didn't measure the distance accurately; you just measured by the bars of the railroad track?

A. No, sir.

Q. What part of the track did the man with the red light walk on; in the middle of the track or on the rails?

A. In the middle of the track between the two rails.

Q. Were you sitting in your carriage on the seat when he stood there?

A. Yes, sir.

Q. Where were your horses?

A. The horses were standing in Brighton avenue.

Q. Which way?

A. They were turned—turned around a little way from the track.

Q. If they were right ahead of you, where would they have been?

A. A little way from the track.

Q. Would they not have been on the track?

A. I think not, sir.

Q. Did you try?

A. I didn't try.

Q. Don't you think if you had tried they would have been on the track?

A. I think not; I don't think they would have reached it.

107 Redirect examination by Mr. RITCHIE:

Q. In your cross-examination I understood you to say that you stood here (indicating) and saw a man up here with a red light?

A. Yes, sir.

Q. And then afterwards you went out and reversed it?

A. Yes, sir; and then I saw the man walking here on the platform.

JOHN M. MORRIS, a witness called on behalf of the aforesaid defendants, being duly sworn, testified as follows:

Direct examination by Mr. RITCHIE:

Q. Mr. Morris, you are familiar with the depot buildings and this location here at Brighton avenue?

108 A. Yes, sir.

Q. Did you take this last gentleman there last evening?

A. Yes, sir.

Q. What for?

A. I was told first that there was a gentleman at Long Branch had a carriage exactly like Mr. Layton's; I think the man's name was Davis that told me, and I went and saw Mr. Travis and told him to drive round to the station; when I got ready I asked him to drive down to the West End railroad station, and we went there; that is all that was said at that time.

Q. What took place after you got there?

A. When we got there, in the first place we drove till the horses' heads stopped probably three or four or five feet from that rail, and there was [a] train coming, and I said to him, "Are your horses afraid of the cars?" and he said, "No;" so I told him to let them stay there. I was sitting on this seat (indicating), and just before that I got on his front seat, alongside of him. The engine came along here (indicating) and he wheeled his horses around after we saw the engine. (Interrupting).

Q. You saw it distinctly from where you sat in the carriage?

A. Yes, sir; but how far it was I could not say. This man
109 turned his horses right around, and he made the remark himself, "I can cross if you want me to," but I said "No, don't you do it." The horses' heads were not over five feet from the rail.

Q. Standing here (indicating) how far could you see up the track?

A. We saw a man that went up there while we sat in the wagon, just the second rail from the corner—standing here, on [a] line with this (indicating).

Q. A little east of the line of the platform?

A. Yes, sir.

Q. Now, what buildings are there here on either side to obstruct the view?

A. I don't know of any; I don't think there is.

Q. Is there anything by the little ticket office?

A. There is nothing there except this building (indicating).

Q. How high is the platform from the ground?

A. Well, it is from 18 inches to two feet. When you get to the end here there is about six feet of an inclined plane—about six or seven—and that runs down, and I should think from this point down to the ground would be about a foot.

Q. Where the slope strikes the platform how high is that?

A. I should judge about a foot from the platform proper to the ground.

110 Q. Now, how high are the eaves of this platform from the ground?

A. They are twelve feet two inches.

Q. And the platform itself is one foot; how high, then, are the posts from the top of the platform to the roof?

A. If you will allow me to look at my memorandum——

Q. Certainly; there is no objection.

A. (After referring to mem.) The posts are ten feet six inches from the top of the platform.

Q. Now, from the eaves of the roof to the top of the platform how much is it?

A. It would be just that much difference; I didn't get that measurement; it is 12 feet two inches from the ground; the eaves project over the platform on the east side, I should say, from three to four feet.

By the COURT:

Q. That is, horizontally?

A. Yes, sir; so that a person, if it was raining, could get out of his carriage on the platform without getting wet.

Q. And there is no other building there which would obstruct the view but that ticket office?

A. Yes, sir.

111 Further direct:

Q. After you had driven down in this carriage did you use the same carriage?

A. Yes, sir.

Q. Like Mr. Layton's?

A. He said it was.

Q. After you had done that you told him you wanted him as a witness?

A. Yes, sir; I told him what I wished to do.

Q. How far is it from the west side of the ticket office to the track, to the edge of the track?

A. Three feet one inch; it is eight feet one inch to the inside of the depot to the east rail of the track nearest the depot.

Q. What proportion of that is on the platform west of the ticket office?

A. I didn't take that measurement, but I think the platform is about half.

Q. What is the width of the platform itself?

A. Fifteen feet nine inches.

Cross-examination by HINCKLEY:

Q. This train that you say was coming along, did you know
112 it was coming along?

A. No, sir; I did not. There was several passed while we were there.

Q. What hour was it while you were there?

A. He said seven; I don't think it was ten minutes out one way or the other.

Q. Did the train stop there?

A. Yes, sir.

Q. Was it a through train?

A. I don't know.

Q. You don't know whether it was a local train or not?

A. No, sir; I didn't notice.

Q. You say it stopped there. Where did the locomotive stop, and where were you standing?

A. I hadn't noticed that; it is the first [time] my attention has been called to it. When this train came in the driver, as I say, turned his horses around and got facing the train again; he says, "I can drive across if you want me to;" I said, no, I didn't wish him to do that. It might have been half way to that platform; I think there was a flagman's house about here, and I think the engine stopped

in front of the flag-house on the south side of that avenue. That is only from my memory; my memory wasn't called to it.

Q. You say you drove right down to here (indicating)?

113 A. Yes, sir; we didn't understake to cross; I said, "Hold on."

Q. Then you stood there and took all your observations standing there; which way were the horses facing when you first made observations?

A. When we stopped the horses' heads were towards the track; then we turned around, and after that the carriage came up here (indicating); I think that time his horses' heads were about—I think the seat would be a little bit east of the east line of that platform.

Q. Did you stand there till that train went by?

A. Yes, sir.

Q. Then, as I understand you, Mr. Morris, now, your team was standing on the line, so that your driver would be on a line with that platform?

A. About that.

By the COURT:

Q. And about the middle of the avenue?

A. Yes, sir.

Further cross:

Q. Now, which way were the horses facing at the time the train went across there (indicating)?

A. Stood facing the train—that is, when the first train passed.

114 Q. You say the horses were facing directly the track when it passed?

A. Yes, sir.

Q. You say you changed the position on the train passing?

A. Yes, sir.

Q. Now, at the time when the men were walking on this track with red lantern——(interrupted).

A. Part of the time the horses stood in the same position; this driver looked to see how far he could see, and after that he went up himself and looked down the other way for himself.

Q. Are you one of the men that was walking on the track while the driver was by the platform?

A. Yes, sir; I was up that night, but I didn't hold the lantern.

Q. What is your business?

A. I am special agent for the railroad.

Q. The observation you made with the men with the red lanterns, was it made from the seat of the carriage or from standing on the platform?

A. Both ways.

Q. And you don't know exactly how the horses' heads were turned?

A. At that time the horses' heads were then towards the

115 track—towards the west—that is my recollection; I don't think there is any doubt about it.

Q. That's all.

Redirect examination by Mr. RITCHIE:

Q. Did you measure the length of the platform along the line of the road?

A. Yes, sir.

Q. Just give us those measurements.

A. From the south end of the ticket office to the south end of the platform is one hundred and eighteen and a half feet. From the south end of the depot here to the middle of the street where the wagon stood it is 150 feet.

Q. Now, did you measure the length of the platform north from the ticket office to the avenue?

A. I took no measurement.

Q. Does that platform extend to Brighton avenue?

A. I didn't walk out as far as that; from memory I should say it did.

116 JOHN R. MOORE, a witness produced on behalf of the aforesaid defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. WILLIAMSON:

Q. What is your business, Mr. Moore?

A. Civil engineer.

Q. How long have you been engaged in it?

A. 11 years.

Q. Did you make that map (showing witness map)?

A. Yes, sir.

Q. From actual measurement?

A. Yes, sir.

Q. When did you make the measurement?

A. In September, 1883.

Q. Is that map correct?

A. Yes, sir.

Q. Have you seen the map that has been produced here by the other side?

A. Yes, sir.

Q. Do the maps generally correspond?

A. Yes, sir; I believe so.

117 Q. Are there any buildings upon the ground covered by that map, except those that are taken up by platforms?

A. Nothing but the flag-house there, and I think a platform to load horses on the cars.

Q. What is the scale of that map?

A. Ten feet to the inch.

By the COURT:

Q. The red lines represent the width of the track, I suppose—the rails?

A. That is the distance between the rails.

Q. Not the width of the cars on the rails?
A. No, sir; nothing but the track—five feet from outside to outside.

Further redirect examination.

Q. Are there any buildings on either side of the railroad from here (indicating) to the Long Branch station?
A. Nothing that I know of as far as that avenue.
Q. How far is that from Long Branch station?
A. About four or five hundred feet.

Cross-examination by Mr. HINCKLEY:

118 Q. You say there was a flag-house; will you point on the map where that flag-house is?

By the COURT: It is on the south side of the avenue?
A. There (indicating).
Q. Do you know how long it has been there?
A. No, sir; it has been there a year I know.
Q. You don't know how long before that?
A. No, sir.

By Mr. VOORHEES:

Q. Can you give the destance between Brighton and Hulick avenues?
A. Only by the scale.
Q. How far is it from Hulick avenue to Bath avenue?
A. It is about three thousand feet, I should judge.

By the COURT:

Q. Much longer than from Brighton to Hulick avenue?
A. Oh, yes, sir.

Ry Mr. VOORHEES:

Q. Now, from Hulick to Brighton avenues—give the distance between the outlines, Mr. Moore.
A. (After measuring on map.) About 405 feet.
Q. What is the width of the avenues?
A. Brighton avenue is 50 and Hulick avenue is 50 feet.
119 Q. That platform extends all the way to Hulick avenue?
A. Yes, sir.

Redirect examination by Mr. WILLIAMSON:

Q. On the plaintiff's map it is called West End avenue; what is it called there?
A. This is called Hulick avenue; taken from our original land map. I believe it has been changed.

Recross-examination by Mr. HINCKLEY:

Q. Did you make that plan from the ground or from the plan map of the company?

A. From my own measurements.
Q. On the ground at Long Branch?
A. Yes, sir.

120 JOHN C. KLINE, a witness produced on behalf of the aforesaid defendants, being duly sworn, testifies as follows:

Direct examination by Mr. WILLIAMSON:

Q. What is your occupation?
A. Engineer.
Q. What kind of an engineer.
A. Locomotive engineer.
Q. How long have you been engaged as such?
A. Six years, growing on seven.
Q. In whose employ?
A. Philadelphia & Reading.
Q. And before that——(interrupted.)
A. The New Jersey Central.
Q. Were you in the employ of the New Jersey Central in the year 1879?
A. Yes, sir.
Q. At the time this accident happened?
A. Yes, sir.
Q. Were you the engineer running that train when the accident happened?
A. Yes, sir.
121 Q. Where was the train coming from?
A. Going south from Long Branch.
Q. Where had you started from?
A. Long Branch.
Q. Where had you started your train from?
A. From Jersey City, but I took it from Long Branch.
Q. The train came down to Long Branch. Where is the Long Branch that you speak of? When you say Long Branch, what do you mean?
A. At the Long Branch station.
Q. How far is that from the station represented on this map?
A. About half a mile, I should judge.
Q. Is it not more than that?
A. It may be.
Q. Who was acting as fireman on this engine with you?
A. James Powell.
Q. Was there any one else on the engine?
A. No, sir.
Q. Or on the tender?
A. No, sir.
Q. Only yourself and the fireman?
A. That's all.
Q. Did you have to ring the bell?
A. No, sir.
122 Q. Whose business was it?

A. The fireman's.
Q. You remember very well the accident?
A. I do.
Q. Do you remember whether the bell was rung at that time?
A. I do; it was.
Q. Who rung the bell?
A. The fireman.

By the COURT:

Q. You say the bell was rung?
A. Yes, sir.
Q. Whilst passing the ticket office?
A. Yes, sir; and before reaching it.

Further direct examination:

Q. I was going to ask where he commenced ringing the bell; how far from the crossing?
A. About 80 rods.
Q. Is that the fireman that had been accustomed to go with you?
A. Yes, sir.

Q. How is it that you recollect the fact of the bells being
123 rung at that time?
A. Because we always ring at every crossing and station, and I know it was rung that day.

By the COURT:

Q. You know because you always heard him ring it?
A. And by having this imposed upon my mind. I recollect it very well.

Further direct examination:

Q. Was your attention called to the fact whether the bell had been rung soon after the accident—did you have a talk with any one about it?
A. No one ever said anything to me about it.
Q. When did you first hear the question about ringing the bell, whether it had been rung or not? Did you ever hear it called into question at all?
A. I heard it in here; that is the only time.
Q. That is the only time?
A. Yes, sir.
Q. Well, when the accident happened, when did you first see the carriage crossing?

A. About half-way between the ticket office and the street.
124 Q. There you first saw the carriage?
A. Saw the horses; yes, sir.
Q. What did you do then?
A. I sounded the alarm whistle.
Q. That is attached to the engine, is it?
A. Yes, sir.
Q. Can any one use that except the engineer?

A. No, sir.
Q. For what purpose is that used?
A. For a warning.
Q. Warning when?
A. Warning for crossings.
Q. Well, what is the bell rung for?
A. The same thing.
Q. You used the whistle at every crossing?
A. Not at every crossing; the bell is rung at every crossing.
Q. The bell is what is used for the alarm at every crossing?
A. Yes, sir.
Q. You use the whistle when?
A. In obscure crossings, or where you see any one on the track, or where you can't see very good.
Q. How many tracks were there then?
A. One.
125 Q. Where did you stop your engine?
A. About at my usual place. It might be a little bit over one way or the other.
Q. Look at the map. I want to call your attention to whether or not you crossed that road. (Indicating.)
A. Yes, sir.
Q. How far across the road?
A. About a car's length over that crossing.
Q. Was that usual for you?
A. Yes, sir; I always run — when I had a heavy train. I used to run the baggage car across the crossing. I did that every day.
Q. How long had you been running that train?
A. From the time it was put on.
Q. How much previous was that?
A. On or about the 10th of June.
Q. Can you recollect any time that you run that train that you didn't cross Brighton avenue?
A. No, sir.
Q. How was it as to time when you approached that crossing—your train—were you on time or not?
A. I was a few minutes late.
Q. How much?
A. I don't recollect; five or seven minutes; somewhere along there.
126 Q. Where was that time lost, before starting from Long Branch?
A. Before starting from Long Branch.
Q. Then you were a little behind time when you started?
A. Yes, sir.
Q. How fast were you going when you crossed Brighton avenue?
A. Not over seven or eight miles an hour.
Q. You stopped you whole train without any difficulty?
A. Yes, sir; the same as I always do every day.

By the COURT:

Q. Seven or eight miles an hour, you say?
A. Yes, sir; as near as I could judge.

Further direct examination:

Q. Could you have stopped it where you did, if you were going much over that?
[A.] ——.

By the COURT:

Q. If you had been going fifteen miles an hour could you have stopped it where you did?
127 A. No, sir; I think I should have had to go a little further. I might have.

Further direct examination:

Q. How many cars were there on the train; there was the baggage car and what other cars; was there a special express car on?
A. No, sir.
Q. The baggage car and the passenger car?
A. That's all.
Q. How many passenger cars were there?
A. 7 or 8; I don't remember.
Q. You had your usual train?
A. Yes, sir; the usual train.
Q. Was that a pretty heavy train?
A. Yes, sir.

Cross-examination by Mr. HINCKLEY:

Q. Mr. Kline, was this what is called the New York express train?
A. Yes, sir; 3.30 express from New York.
Q. It left Jersey City and run to Long Branch in charge of another engineer?
128 A. Yes, sir.
Q. And then you took the train at Long Branch?
A. Yes, sir.
Q. And you started a few minutes behind time at Long Branch?
A. Yes, sir.
Q. And then commenced the run towards the West End station?
A. Yes, sir.
Q. Was West End station one of the regular stopping places of the express train?
A. Yes, sir.
Q. Do you know whether or not there were many passengers got off of this particular train?
A. Yes, sir; a great many.
Q. Do you know how many got off at the West End station, many or few?
A. No, sir; I do not; I couldn't say.

Q. You don't remember? Was there much baggage let off at West End station?

A. Very seldom we had any for there.

Q. Had you any on this particular train?

A. Perhaps two or three valises, or something like that. That is about all we carried.

129 Q. Do you know that there is a switch on the road where the New Jersey Southern joins it?

A. Yes, sir.

Q. How near did you run to that switch on this particular night of the accident?

A. Well, I couldn't tell you that.

Q. Were you close to it?

A. I was towards the station; what I call that side (indicating) of it.

Q. Of course, as an engineer, you are familiar where all the switches are?

A. Yes, sir.

Q. How near were you to that switch on that particular night?

A. I didn't look.

Q. So you can't tell us now. How near to that switch did you usually stop that train; did you always run that train?

A. Yes, sir; every afternoon.

Q. How close to that switch was it your habit to stop every afternoon?

A. That I couldn't tell you; I generally run my baggage car over or on the crossing; that is, the engine would be on the other side.

Q. You run your baggage car over or on the crossing?

130 A. Yes, sir; the crossing on Brighton avenue; that was my usual habit.

Q. Do you remember how much further you carried your baggage car on this particular afternoon?

A. I might have gone a few feet further; I might vary four or five feet; somewhere along there.

Q. In railroading is it not unusual to run the baggage car beyond the platform?

A. I had orders from my conductor to run the baggage car on the crossing, so as to leave the passengers on the platform, as we had a long train.

Q. How old are you now?

A. I am 32.

Q. How long have you been a locomotive engineer?

A. Growing on seven years.

Q. Growing on seven years?

A. Six years last June.

Q. When did you first go on a locomotive; you didn't begin as an engineer, did you?

A. Commenced as fireman.

Q. You were made engineer about six years ago?

A. Yes, sir.

Q. Then you were in the employ of the New Jersey Central?

A. Yes, sir; I was.

Q. Now you are employed by what road?

131 A. Philadelphia and Reading.

Q. Are you running on the same road?

A. Yes, sir.

Q. Simply on that road because they have leased the New Jersey Central?

A. Yes, sir.

Q. Now you say it was the engineer's duty to ring the bell—I mean the fireman's duty?

A. Yes, sir.

Q. Now, can you tell the court and jury that you saw Mr. Powell ring that bell on this particular night?

A. I did; yes, sir.

Q. You saw him?

A. Yes, sir, I saw him. He called by attention to this wagon going across the track. I looked over and he was ringing the bell all his might, and he hollered to me and he was half way——(interrupted.)

Q. Now, did he pull the bell before he called your attention to the horses?

A. Yes, sir.

Q. How far?

A. About 80 rods north of this avenue.

Q. Now you say you rung the alarm whistle?

A. I sounded the alarm whistle.

Q. Of course you have only one whistle?

132 A. Yes, sir.

Q. But you gave it a particular pull. When did you sound that?

A. It was very near half way between the station and the crossing while passing the waiting-room.

Q. You were passing the waiting-room—that was the first time you blew it?

A. I blew it up above here——(indicating.)

Q. That is at the upper station. How far above were the horses and carriages across the track when you first saw them?

A. When I first saw them they were about stopped on the middle of the track. They were prancing when I first saw them.

Q. Then you were about half way between the station and the crossing?

A. Yes, sir.

Q. And you were running eight miles an hour?

A. I was then — I took the crossing.

Q. Were you running faster or slower when you passed the station?

A. I was going a little faster and was trying to stop.

Q. When did you shut the steam off?

133 A. I suppose 50 or a hundred feet from the north end of the platform.

Q. What is the length of the engine and tender?

A. The engine that I am running now measures 53 feet.

Q. What do you include in that measurement?
A. I include from the centre of the front wheel of the truck to the centre of the back wheel of the tender.
Q. You had a cow-catcher?
A. Yes, sir.
Q. You do not include that?
A. No, sir.
Q. How much of the tender?
A. To the centre of the hind wheel.
Q. What was the length of the tender?
A. That I couldn't tell you.
Q. Well, about?
A. Well, I would have to guess at it.
Q. What is the length of the pilot?
A. It is about four feet.
Q. What is the length of the baggage car?
A. I should think about 55 feet.
Q. As you stood upon the engine coming up the crossing could you see a person coming upon the track?
134 A. As I was coming up?
Q. Yes.
A. Yes, sir.
Q. On which side of the engine did you stand?
A. On the right side.
Q. Now could you see any one crossing the track or coming on the track unless you leaned over to look?
A. No, sir; not till they got nearly on the track.
Q. I want to know why it was that the fireman called your attention to something on the track.
A. He saw it before I did; I couldn't see it on account of my being on the right side?
Q. And what prevented you seeing?
A. The engine.
Q. And he was ringing the bell, then, when he called you?
A. Yes, sir.
Q. The reason for crossing the avenue was for the accommodation of passengers?
A. Yes, sir.

Recross-examination by Mr. VOORHIES:

Q. What is the length of a passenger car?
A. About sixty feet.
135 Q. How far is it from where you stand on the engine to the front part of the cow-catcher?
A. I should judge from 12 to 15 feet, perhaps more; I never measured it.
Q. Don't you know it is more?
A. I could not say.
Q. How much does the cow-catcher extend beyond the front wheel of the engine?
A. About four feet.

Q. How near are you to the centre line of the front wheel of the engine and the back wheel of the tender; how near are you to the middle?

A. I am about over the back driving wheel.

Q. Was that the construction of that engine at the time?

A. Yes, sir.

Q. You had the same construction then in 1879, did you?

A. Yes, sir.

Q. Are you nearer to the front wheel of the engine or the back wheel of the tender?

A. Well, I am just about in the centre.

Q. That's all.

Adjourned till the hour of ten o'clock in the forenoon of Saturday, the 27th day of September, A. D. 1884.

136 JAMES POWELL, a witness produced on the part of the aforesaid defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. WILLIAMSON:

Q. Were you on the train in June when this accident happened?

A. I was on the engine.

Q. You were on the engine in what capacity?

A. Fireman.

Q. How long had you been engaged as fireman on that train?

A. Well, I had only went on board that particular train some time in June.

Q. Was that your regular business at that time?

A. Yes, sir.

Q. Who was your engineer?

A. John C. Klein.

Q. You remember the occasion of your approaching the West End station and a carriage being run down?

A. Yes, sir.

Q. Did you see a man on the crossing or near the crossing before you struck?

A. Yes, sir; before I got on the crossing—I saw him before I got on the crossing.

137 Q. Now, where were you when you first saw him?

A. I was north of the ticket office I suppose about, as near as I can guess, some 75 feet.

Q. Where did you see him?

A. I saw him east of the track.

Q. What was he doing or did you notice anything with regard to his horses?

A. Well, he appeared to be starting to go. (Interrupted.)

Q. Did you see him start to go?

A. Well, I couldn't say. He wasn't stopped exactly the first time I saw him, but he did stop.

Q. How far from the track?

A. Probably about ten feet or more.

Q. Were you ringing the bell?
A. Yes, sir.
Q. Before you saw him?
A. Yes, sir.
Q. How long before?
A. Well, I rung it all of thirteen or fourteen hundred yards. I rung continuously from Long Branch with the exception of a block between those streets. I may have stopped for a short interval between the street near Long Branch and this street north of the depot.
Q. You may have stopped between that and Long Branch.
138 Did you stop ringing between here (indicating) and the crossing?
A. I may have stopped probably.
Q. That is West End avenue?
A. No; I didn't stop there.
Q. You didn't stop between West End avenue?
A. No, sir.
Q. Is that your business to ring the bell between the crossings?
A. Yes, sir; that is part of my business.
Q. Are you sure that on that day you did ring the bell?
A. Yes, sir.
Q. Have you any remembrance, at any time, of anything preventing you previous to that time from discharging this duty of ringing the bell?
A. None whatever in that place.
Q. Well, did you give any notice to the engineer?
A. I called the engineer's attention to the horses and carriage crossing the track.
Q. Then what did the engineer do, if anything?
A. He blowed the whistle, as near as I can understand.
Q. Explain to the jury how you could see this carriage before the engineer could see it?
A. Being on the left side of the engine—that is, the side to-
139 wards the carriage—and the engineer being on the opposite side of the engine, he couldn't see it as soon as I could.
Q. You say it is your business to ring the bell?
A. Yes, sir.

By the COURT:

Q. What did the engineer do—did he state?
Mr. WILLIAMS: Yes, sir; he said the engineer sounded the whistle.
Q. That's all.

Cross-examination by Mr. HINCKLE:

Q. Where was the engine when the whistle was sounded?
A. When the whistle was first sounded?
Q. When you spoke to the engineer and the whistle was sounded, where was the engine?
A. It must have been close by the ticket office, as near as I can recollect; probably a little by it, as near as I could judge.

Q. Near the ticket office?

A. Yes, sir—that is, at that time; but the whistle had been sounded before coming to the crossing, however.

Q. How do you know that?

A. By hearing it; and it is the custom always to do it.

140 Q. Was the steam on or off at the time you were passing the ticket office?

A. Well, the engine was blowing off; we wasn't using no steam to pull the train. The steam was shut off and the steam escaped from the cock-valve.

Q. You used no steam to propel the train?

A. No steam to propel the train.

Q. How fast were you going?

A. I should judge about seven or eight miles an hour.

Q Have you had any conversation recently with anybody about this case?

A. Well, I can't say that I have.

Q. Have you been over on the ground and made any measurements—anything of that kind?

A. I have been by there dozens of times since, but I have never been off my engine to make any measurements or look at it.

Q. Then when you say seventy-five feet or so, it is not actual measurement?

A. I should say it was about that, as near as I can remember.

Q. How do you remember about ringing the bell?

A. I remember it was my duty to do it, and on account of this accident, and my attention being called to it afterwards.

141 Q. Who called your attention to it?

A. I had to make a statement a few days afterwards to Mr. Morris.

Q. And have you talked about it recently to Mr. Morris?

A. Well, I haven't told him anything particular about it.

Q. But you have talked about it?

A. I told him in a general way about it.

Q. You told him about ringing the bell particularly, haven't you?

A. I spoke about ringing the bell—yes sir.

Q Now, Mr. Powell, can you tell us where the horses were when you first saw them? Locate them as near as you can.

By the COURT:

Q. Do you understand the map?

A. Not very well.

Q. This was the railroad you were on, and this is Brighton avenue, and there is where the accident took place (indicating).

A. Somewhere along about here (indicating), as near as I can judge.

Q. Do you know whether or not the horses were on the track when you first saw them?

142 A. They were not on the track when I first saw them.

Q. Now, could you tell me where the engine was when you first saw them—what part of the track?

A. Probably somewhere along about here, as near as I can think

Q. Along about there?

A. Somewhere along about here, as near as I can judge. I can't say positively about that. We were going along that way, and I took no note of the time.

Q. After the accident you went on with the train, didn't you?

A. After the accident was over and the conductor found out what became of the party, he gave the signal to go on.

Q. Well, you went on with the train, didn't you?

A. We didn't go on till after we got the signal from the conductor.

Q. How long have you been fireman?

A. Over five years; that is, I am not a fireman at present.

Q. How long had you been a fireman on an engine when this accident took place?

A. I had been a fireman about a year.

By the COURT:

Q. You had then been?

A. Yes, sir.

143 Q. And how many years after that did you serve as fireman?

A. Four years, as near as I can remember.

Q. Are you not a fireman now?

A. No, sir.

Q. What is your occupation now?

A. Locomotive engineer.

Q. That's all.

Redirect ex.:

Q. You stated that when you spoke to the engineer he blew the whistle. Had the whistle been blown before that or not?

A. Yes, sir.

Q. How long before?

A. Quite a distance down; I don't remember particularly; 80 rods or more before we appreached the first street to the depot.

Q. Before you approached that street (indicating)?

A. Yes, sir.

Q. Do you remember whether it was blown any between there and the time you spoke of here?

A. The steam had *blew* off coming over that crossing.

By the COURT:

Q. The steam blew off between West End avenue and the depot—do you mean that?

144 A. Yes, sir.

Recross-examination:

Q. You are familiar with the location of the switch that switches off on the New Jersey Southern, near this West End station?

A. I know there is one there, but how far off I don't know.
Q. Can you tell us how close to the switch you stopped the train at the time of this accident?
A. No, sir.
Q. That's all.

JONATHAN O. STOKES, a witness produced on behalf of the aforesaid defendants, being duly sworn according to law, testified as follows:

Direct examination by Mr. WILLIAMSON:

Q. Where do you reside?
A. Germantown.
Q. How long have you lived there?
A. Since 1841.
Q. What is your occupation?
A. Solicitor for the Union line, United Railroad of New Jersey Division, and the New York & New England.
Q. Have you an office in Philadelphia?
A. The office I am employed in is 23 South Fifth street.
145 Q. How long have you occupied that office?
A. I have been in this position since May, 1876—that is, I have been in that office; at the time this accident occurred I was with the National line, but the National has been merged into the Union, and the position is practically the same now as it was then.
Q. Were you in the same office with Mr. Hackett?
A. I was, sir.
Q. Are you still?
A. Yes, sir.
Q. Were you on the excursion that went from Germantown to Long Branch?
A. It went from Philadelphia.
Q. Where did you get on?
A. Germantown Junction.
Q. Did you see Mr. Hackett before you got on?
A. Yes, sir.
Q. Where did you see him?
A. He was at Germantown Junction at the same time.
Q. Did you both get in at the same time?
A. Yes, sir.
Q. And you both went on the train to Long Branch.
A. Yes, sir.
Q. Where did you dine at Long Branch?
A. We dined at the hotel there; I believe it is called the West End.
146 Q. What hour?
A. I think it was somewhere close to two o'clock when we sat down.
Q. Who were you with?
A. I was with Mr. Hackett.
Q. After dinner did you take a ride with him?

A. Yes, sir.

Q. About what time was it when you took the ride—commenced?

A. I should think it was in the neighborhood of four o'clock.

Q. Now, will you state what took place from the time you started at the West End, and tell us where your route was, and when you were over at the West End depot, and what occurred afterwards?

A. Well, after the dinner and speech-making and toasts, and so on, continued in the dining-room till along towards four o'clock, I suppose, and then the proprietor was anxious to get the use of the room for the incoming guests—it was Saturday afternoon—and the people all came out then, we along with the rest, and somebody said a steamboat was about to land up at the iron pier, and it was suggested we go up to see it, and so Mr. Hackett and I were together and we agreed to go up and see it, and Mr. Hackett went out and got a carriage and I went out and got in, and we drove up
147 above the iron pier and down again and stopped at the pier a few minutes and saw the people get off, and so on, and then we started on and drove——(interrupted).

Q. What took place at the pier?

A. Well, nothing very special, I think. The horses rested there.

By Mr. RITCHIE:

Q. Your team?

A. Yes, sir, and we didn't tarry very long. We drove down as far as—it was pointed out to us as Gen. Grant's cottage. We turned around then and came back. I believe the roads diverge there, one running up towards the hotel and one down to the depot, and the question was raised whether we should go to the depot or the hotel. I favored going to the depot, and we went down to the depot and drove up to the platform, and I understood our ride had come to an end; and Mr. Hackett he got out his pocket-book to pay the driver, and there was a number of carriages arriving just then, and somebody said, There is a train coming, and the driver signified that he would have to get out of there, and the horses were wheeled around, and I saw the train coming and I thought we would go back the way we came; but, much to my surprise, the horses were driven around and driven over the track. I looked around and saw the locomotive right on top of us. I said, "My God, Jim, jump!" and I jumped and I got on the ground, and when the train stopped I looked under the car, and I saw a man there all
148 bundled up, and I ran around and saw it was Mr. Hackett; he was then lying on his face with his hands under him that way (illustrating), with his head towards the fence, and I turned him over and there was another man arrived there just about this time; and I turned him over and his pocket-book was in one hand and a note in the other, and I picked the note ud and put it in the pocket-book and put it in my pocket. His watch was out of his pocket, but whether it was entirely detached from his chain or not I do not recollect now, but I got the watch and put it in my pocket, and then the conductor got off the car and asked if anydody knew him; I said I did; his name was James Hackett, National Line; 23 S. Fifth

street, I believe, was the address I gave, and somebody said the doctor was coming, and he was then put into a blanket and they carried him upon the platform and eventually into the station. Then the doctor came and Mr. Hoey came also. For awhile he was unconscious and afterwards he appeared to have some signs of consciousness, and the time came to go and he was put on the stretcher. The hotel proprietor invited him to stay there if he wanted to, but the doctor said to me, We had better get him home now or we might not get him home for some time. He was put into the baggage car and Mr. Hoey gave me some brandy, and the doctor told me to give him a little if he appeared to need it, and we came on up nearly to Monmouth Junction and there I requested the
149 conductor to telegraph to Stephen B. Kingston, at whose residence I was then living, to send a carriage and meet me at Germantown Junction. James Hackett had been badly hurt. We got to Germantown Junction about 7.30 or 8 o'clock, and there we had to wait an hour—possibly over. I think it was after ten o'clock when Charles Kingston got down with the carriage, and we drove up to Germantown, and when we got to his house I suppose it was nearly half past 11 o'clock. I left Charlie Kingston and the driver in charge of Mr. Hackett and went up to the doctor and alarmed him and brought him down, and the doctor and all of us brought him in and took him up stairs, and I passed his effects over to Mrs. Hackett, and bid them good night and went home. He continued in about the same way till—nothing particular happened till about four days afterwards, I think it was, I was sent for to go down to the Pennsylvania railroad office, and was called on to make a statement in regard to this accident, and I then and there stated my views in regard to it and the letter or memorandum, whatever it might be termed, was forwarded to Mr. John Hoey, at Long Branch. Mr. Kingston, in fact, told me that he had received word from Mr. Hoey, and he wanted a statement of this affair. Mr. Hackett continued at his home I believe—I think that was Saturday—I think he continued there for two weeks. The following Monday two
150 weeks—the following Saturday a week after—that is, two weeks from the day of the accident—I went down to Atlantic City. I got back on Monday morning to my office about ten o'clock, and there was word there they wanted me to come out to Germantown. It had been decided — Mr. Hackett should go to the asylum. I went out there and saw Mrs. Hackett, and she asked me to go with them, and we got started, I suppose, between two and three o'clock in the afternoon, and went over to the asylum and left Mr. Hackett there. I drove over there two or three times afterwards and saw him.

Q. What became of the pocket-book and money?

A. The pocket-book and money that I picked up I put in my pocket and I handed it over to Mrs. Hackett with the watch and pocket-book and money.

Q. Tell us when you (look at the map, won't you) drove up here (indicating)?

A. Yes, sir; I should say 15 or 20 feet from the end of the plat-

form. I could have stepped out of the wagon any time right on the platform.

Q. And when you drove out from there to go over Brighton avenue, how did he move the horses?

A. He wheeled right around about there (indicating), right around that way.

151 Q. Did he back the horses out or did he drive them around.

A. He drove them around.

By the COURT:

Q. Right into the avenue and then towards the crossing?

A. Yes, sir.

Q. Before you left the platform did you or not see the train?

A. I saw the train; yes, sir.

By the COURT:

Q. Before you left the platform?

A. Yes, sir.

Q. When you got into Brighton avenue did you see the train?

A. I didn't see it till I yelled to him to jump. When we swung around we made a sort of circuit partially, and afterwards I looked and saw the locomotive there, and I yelled to him, "My God, Jim, jump," and I jumped.

Q. You jumped in consequence of seeing the train?

A. Yes, sir.

Q On which side of the carriage did you sit?

A. On the left-hand side.

Q. On which side did you get out?

A. On the left-hand side, sir.

Q. On which side of the railroad did you land?

152 A. I landed on the east side of the railroad. I jumped out lengthwise with the railroad, and I fell about here close to the track.

Q. On the east side?

A. On the east side; yes, sir.

By Mr. RITCHIE:

Q. And on the south side of Brighton avenue?

A. Yes, sir.

Q. How far from the track did you land?

A. That I couldn't say, sir. You know when I took that header and went out I went first on my hands and knees, and then I fell forward.

By the COURT:

Q. What do you mean by "header"?

A. I mean I was in the back part of the carriage, and the top was down, and when I saw this thing there I put my hands right on the side of the carriage and jumped right over the wheel.

Q. You mean you went head forwards?

A. I went right straight out on my hands. I didn't stop to look how I was going. I got right out.

Q. How far from the track did you land?

A. All I know about it, I was full of dirt and dust and grit blowing off me, I presumed from the cars, afterwards.

153 Q. Did you notice in the meantime what the driver was doing?

A. It was just like that (indicating). We went right around there from the time it started. He wheeled around there.

Q. Did he stop at all?

A. Only just like a horse would flinch when we were going to a thing they didn't like, and then plunge forward.

Q. Did he turn to look at all?

A. No, sir.

Q. Did I understand you to say some one said the train was coming?

A. Yes, sir.

Q. Do you know who that was?

A. Well, I don't positively recollect now. At the time the thing was fresh in my mind; when I made the notes in this thing I was under the impression it was Mr. Hackett. It was a kind of general conversation between us. There was a number of handsome turnouts coming around this depot at that time, and the thing was there was a train expected.

Q. Now, tell us as near as you can what the driver said?

A. Well, the driver, from what I can gather from it, or what

154 he said at the time was that it was necessary for him to get out of there. I had the inference, and understood it at the time (interrupted)——

By Mr. HINCKLEY: Never mind what you understood. Just state what he said.

Q. You can state what was said, and then exactly what took place.

A. It was so long ago I could not give the exact grammatical expression a man might have made use of at the time, because I never placed any importance to the matter to bother myself about it.

The COURT: The question is whether it is proper for the witness to state what the driver said.

Mr. HINCKLEY: No; it is the inference we object to.

By the COURT:

Q. What was said by the driver? State the substance.

A. That it was necessary for him to get out of there; his horses wouldn't stand the steam.

Q. And I must get out of here—something of that kind?

A. Yes, sir; something to that effect.

Q. Who did you say called upon you to make a statement?

A. Stephen B. Kingston.

A. Who is he?

155 A. He was at that time general freight agent of the Pennsylvania railroad.

Q. What is he now?

A. He died in 1879.

Q. Had he any connection with the Central Railroad Company that Mr. Little was running at the time?

A. I don't know whether the Pennsylvania Railroad Company operated in conjunction with it or not.

Q. That was before the agreement?

A. I don't know anything at all about it.

Q. But he wasn't an officer of the Central railroad?

A. No, sir.

Q. Were you called upon to make a statement by persons friendly with the Pennsylvania or the Central Railroad Company?

A. I was sent for to go down to 223, I believe it is, South 4th street.

Q. Where is that?

A. The Pennsylvania Company's building, in 4th street, in Mr. Kingston's office, and Mr. Kingston told me that he got word from Mr. John Hoey.

Q. And who is Mr. Hoey?

A. A gentleman that lives down at Long Branch.

Q. Well, connected with the Adams Express Company, is he not?

A. I think he has some connection with it; yes, sir.

Q. You made a statement?

156 A. Yes, sir.

Q. What did you do with it?

A. I made a statement, and sent it to Mr. Hoey.

Q. Did you keep a memorandum of it?

A. When I stated to Mr. Kingston what the thing was, Mr. Kingston turned round to his clerk and said, "You take notes of that"; and he handed me the notes, and I drew the letter from these notes and sent the letter to Mr. Hoey, and put the notes in my pocket.

Q. Have you looked at the notes since?

A. Yes, sir; I have glanced over them.

Q. Does the statement you made then differ in any respect from the statement you made here?

A. Not materially, sir; I consider the action occurred solely and entirely from the action of the driver.

By Mr. VOORHEES: Never mind what you consider.

By the COURT: No; that is not proper, sir.

Cross-examination by Mr. HINCKLEY:

Q. Have you those notes?

A. Yes, sir.

Q. Have you got them with you?

A. Yes, sir.

157 Q. Will you produce them? (Witness did so.)

Q. How long after the accident do you say these were made?

A. It must have been three or four days; not longer than that.

Q. You directed them to Mr. John Hoey, did you?

A. Yes, sir.

Q. Are these notes taken by the clerk or are they your notes?

A. They are his notes.
Q. Did he direct them to Mr. Hoey "Dear Sir?"
A. No, sir; he took down the notes and I wrote the letter from the notes.
Q. Where are the notes that the clerk took down?
A. Those are the notes.

By the COURT:

Q. The notes were taken by the clerk from your statement?
A. Yes, sir.
Q. And these are the notes you got from the clerk, you say?
A. Yes, sir; he took them and I went back to my office and wrote the letter.
Q. You say you drove up to the side of the platform?
158 A. Yes, sir.
Q. How long did you remain there in the carriage?
A. It may have been one or two minutes.
Q. 15 or 20 feet from the end?
A. Yes, sir; that would be my judgment.
Q. While you were there this one or two minutes, what conversation took place between you and Mr. Hackett?
A. As I recall it, it was a general conversation about some carriages that were there—some very nice-looking turnouts that were there that day.
Q. Different styles of equipages, and so forth?
A. Yes, sir. There was a good deal more style than we have in Philadelphia—top boots and such things.
Q. Anything else that you talked about besides the style of carriages, and so on?
A. No, sir; not specially that I recollect of.
Q. Then it was that somebody made the remark about the train?
A. Yes, sir.
Q. You don't know now positively who it was made the remark?
A. No, sir.
Q. Where was the carriage? You say you first saw the train standing at this place (indicating).
A. Standing there; yes, sir.
Q. About 15 or 20 feet from the end?
159 A. Yes, sir.
Q. It was then that you first saw the train?
A. Yes, sir.
Q. What part of the train was it that you saw first?
A. I saw the locomotive.
Q. When you saw it as you were sitting in the carriage did you make any remark about it?
A. That is a thing I couldn't say now positively.
Q. You couldn't say anything about that?
A. No, sir.
Q. Then the driver made the remark that he must get out of there; did that follow next?

A. The remark that was passed around was that the train was coming, and I looked and saw the train coming.

Q. You saw the locomotive?

A. Yes, sir.

Q. And then the driver made the remark I must get out of here?

A. Or words to that effect.

Q. Then you say he drove the carriage right around?

A. Yes, sir.

Q. He didn't back his horses?

A. No, sir.

160 Q. He drove them forward and around?

A. Yes, sir.

Q. And got into Brighton avenue?

A. Yes, sir.

Q. And then went towards (interrupted)——

A. Went right across the tracks.

Q. And you didn't see the engine, then, till you got further out into Brighton avenue?

A. Yes, sir.

Q. And then you said "jump," and took the header you spoke of?

A. Yes, sir; I took the header.

Q. Do you know where the horses were when you took the header?

A. I should judge the horses must have been on the track.

Q. As soon as you saw the engine you took the header?

A. Yes, sir.

Q. Do you remember whether you were close to the locomotive or not when you gathered yourself up on Brighton avenue?

A. No, sir; I wasn't close to the locomotive.

Q. Now, you could not have touched it?

A. No, sir; I was just in front of the hind trucks of the car.

161 Q. Just in front of the hind trucks of the car?

A. Yes, sir.

Q. When you gathered yourself up?

A. Yes, sir.

Q. Then you must have fallen on the track?

A. No, sir.

Q. Oh, you were just at the side of the trucks of the car?

A. Yes, sir.

Q. How close were you to the railroad, Mr. Stokes?

A. Well, sir, that I could not actually tell you. I was full of grit and dirt from the (interrupted).

Q. Was it grit and dirt from the soil of Brighton avenue, or from the soil of the railroad track?

A. I thought it was the dust from the railroad train.

Q. Do you remember whether, if you had put your hand out you could have touched the rail or not when you picked yourself up?

A. No, sir; I don't. I was pretty close to it, I know.

Q. What distance was Mr. Hackett from the rail when you saw him *you saw* bundled up; how far from the west side of the track?

A. I think he lay about there. (Indicating.)

Q. Was that close to the fence?

162 A. I think it was about six or eight feet back from the fence. I didn't see him till after I got up. I heard somebody say he struck the fence and rebounded.

Q. Whose fence was it, do you know—the fence of whose place?

A. No, sir; I don't know.

By the COURT:

Q. He was on the west side of the railroad; how far from the railroad track?

A. I should say he must have been ten or twelve feet from the track and about six or eight feet from the fence; that would be my judgment of it. I never went to the place to measure.

Q. Six or eight feet from the fence of the avenue?

A. The fence that went along the avenue.

By Mr. VOORHEES:

Q. The fence that runs along the avenue or along the railroad?

A. No, sir; this fence that runs along here. (Indicating.)

Q. It runs like that. (Indicating.)

A. Yes, sir.

By the COURT:

Q. He was in the avenue?

A. Yes, sir; I suppose you call it the avenue.

163 By Mr. VOORHIES:

Q. Was there any fence running down along the side of the railroad there?

A. Not that I am aware of. I didn't go around there, and I couldn't tell anything about that, sir.

Q. You can't tell whether there was any fence running down the side of the railroad or not?

A. No, sir; not to my knowledge.

Q. And you think it was within six or eight feet of the avenue there?

A. Yes, sir.

Q. When you were sitting in the carriage, standing there, was there anything said about going to Hoey's garden?

A. No, sir; not to my knowledge.

Q. Stephen B. Kingston was your father-in-law, wasn't he?

A. Yes, sir.

By Mr. VOORHIES:

Q. What was Mr. Hackett's condition; was he able to move himself at all when you discovered him?

A. No, sir; I thought he was dead. I turned him over.

Q. He was ten or twelve feet from the track, and six or eight feet from the fence?

164 A. Yes, sir; he was bleeding from the nose and mouth. I had seen a good many dead people, and I thought he was one of them.

Redirect examination [by Mr.] WILLIAMSON:

Q. Was there any price fixed for taking the drive and driving to the depot?

A. I was not present when Mr. Hackett made the bargain.

Q. Well, that is all; you needn't answer if you don't know; you stated the fact that he had his pocket-book out?

A. Yes, sir.

By Mr. VOORHIES:

Q. When you found him?

A. Yes, sir.

By Mr. WILLIAMSON: Yes; and when he was in the carriage.

By Mr. VOORHIES: Did he say he had it out when he was in the carriage?

Q. In the carriage, you say, he took his pocket-book out?

A. He took the pocket-book out, and was in the act of getting the money out. He had his pocket-book out and his hand in it.

165 By the COURT:

Q. You found it on the ground?

A. He was lying on his face with his arms doubled up under him in this way, and I turned him over, and blood was running out of his mouth, and his hands fell out that way, and the book fell out of one hand and the note out of the other, and I picked up the book and note and put them in my pocket.

Q. Do you know what the amount of the note was?

A. No, sir; I do not.

Q. That's all.

MOORE recalled.

Further direct examination by Mr. WILLIAMSON:

Q. Do you know where that hotel is that Mr. —— spoke of?

A. Yes, sir.

Q. Is it between the New Jersey Southern and the sea?

A. Yes, sir.

Q. And on which side of Brighton avenue is (interrupted)—

By the COURT: What hotel was it?

By Mr. RITCHIE: Cavanaugh's hotel.

166 A. I didn't know exactly, but there is a building about here which I understood to be the hotel; I have never been there.

Q. On the south side of Brighton avenue?

A. Yes, sir.

Q. Facing on Brighton avenue?

A. Yes, sir.

Q. And east of the New Jersey Southern?
A. Yes, sir.
Q. Can you give us, approximately, the distance from that hotel to the platform?
By Mr. RITCHIE: It was stated by one of the witnesses yesterday that it was about a hundred yards.
A. My impression is that it is not as far as that; I should judge it is about two hundred feet.

By the COURT:

Q. From the platform to a point in front of the hotel?
A. Yes, sir.

By Mr. VOORHEES:

Q. My I ask this gentleman a question on another subject, about the width of the right of way there? Do you know, Mr. Moore, the width of the right of way of the railroad?
A. No; I can't tell you that.

167 By the COURT:

Q. How wide was the space that the railroad company owned, one hundred feet?
A. I think it was a hundred feet. It varies in that locality.

By Mr. VOORHEES:

Q. Has Mr. Hoey a fence running south from Brighton avenue?
A. Yes, sir.
Q. How near is that to the railroad?
A. Now?
Q. Yes, and was then?
A. It is now about thirty feet from this track.
Q. About thirty feet from that track?
A. Yes, sir.
Q. That track has not been moved since then?
A. No, sir. I think the fence was different at that time, however. I am speaking of the fence as it now is.
Q. You don't know how it was at the time of the accident?
A. I know how it was about the time of the accident.
Q. How was it about the time of the accident?
168 A. Not more than ten feet from the track, I think, a little previous to the accident.

By the COURT:

Q. Hoey's fence, west of the railroad, was not more than about ten feet from the track?
A. About that time. The fence was moved about that time.

By Mr. VOORHIES:

Q. Well, was it moved before the grading for the second track was put there?
A. Yes, sir; it had to be.

Q. Was this second track graded at the time of this accident?
A. Partially; part of the grading was done before the fence was moved; there was some grading inside of the fence.

By Mr. WILLIAMSON: This is all on new matter.

By Mr. VOORHIES:

Q. How wide is the second track; how much ground is occupied by the second track from the west rail of that track to the west end of the sleepers of the second track—the outside end of the sleepers?
A. Thirteen feet and a half.
Q. That's all.

By Mr. WILLIAMSON: This map is considered in evidence?
By the COURT: Yes, sir.

Defendants rest.
Case closed.

169 By the COURT:

"I will say to counsel that on enquiring of Judge Nixon I find that he is in the habit of hearing motions for nonsuit. I don't think there has been any decision of the supreme court on the subject. I know it has been the general understanding of the judges, when the matter has been discussed, that a failure to hear a motion of nonsuit or to grant a nonsuit in any case is under the discretion of the judge to hear it or not. I suppose that in a State like New Jersey, where it is the practice to grant a nonsuit, it would be no error to grant a nonsuit; but, it being in the discretion of the judge to hear the motion or not, my own impression is so strong that the nonsuit would not be granted under the circumstances of the case, that I have no hesitation in stopping the argument and have all the questions come up on the instructions to be given to the jury."

Counsel summed up.

The court then charged the jury, which returned a verdict for the plaintiff of seven thousand dollars ($7,000).

170 The portions of the charge of the court to which exceptions are taken are as follows:

The honorable court erred in instructing the jury that, "If you come to the conclusion that they did not ring the bell that they were guilty of negligence, then they would be liable, unless they can make out that the plaintiff on his part was guilty of negligence. Now, at the outset of the consideration of that part of the case we are met with the question of law: was the plaintiff responsible for what the driver did? Were the acts of the driver the same as if they had been acts of the plaintiff? Was the driver at the time the servant and under the control of the plaintiff in driving his team? Now, gentlemen, on this point I charge you that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence

of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is
171 riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time. If I am a passenger in a railroad train, and the railroad crosses another railroad, and there is another train on that other railroad, and the two trains come into collision, and both parties are in fault, I may either sue the railroad company on whose train I am travelling, or I may sue the railroad company owning the other railroad; I may sue either or both, if both are at fault. That is clear in the case of a railroad, because I, as a passenger, have no control whatever over the driving of the cars; and it is also true in the case of a street car. This case is not the case of a railroad car or a street car, but it is the case of a common carriage, and the question is whether the passenger in a common hack or carriage, driven by a person in the employ of the owner of the carriage, has any more control over the driver than a passenger has in a railroad train. Undoubtedly the cases are not exactly alike; the passenger in the carriage may direct the driver where to go; to such a park or to such a place that he wishes to see; so far the driver is under his direction, but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of the team—are the persons responsible for the manner of driving, and the passenger is not responsible for that unless he interferes and controls the matter by his own commands or require-
172 ments.

If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference.

The evidence is before you, gentlemen, on this subject. I cannot recall anything in it to show that the plaintiff took any responsibility about the driving, and if that is so, then he [is] not liable for what the driver did; but if you think otherwise, if you think he was liable in consequence of any interference with the driver, for what the driver did, then comes up the question whether the driver himself was guilty of any conduct that would prevent him from recovering damages of the defendant had he been injured. On this subject I shall not have much to say to you, gentlemen. You remember the evidence, his own evidence and the evidence of others, on the subject. He says that when he turned around (he says he backed out

and turned into the avenue), and when they turned around and got into the avenue he looked up both ways and could see nothing. Well, if the cars were so close to him as to strike
173 him before he got across, and were only going eight miles an hour, it is strange he didn't see them if he looked just before putting his horses upon the tracks; but still it is hardly possible that a man who had seen the cars would have ventured to cross. I think, therefore, that the probability of his evidence being correct, in saying he didn't see the cars is pretty strong; but if he did not see them, ought not he to have seen them? That is a point that the plaintiff's counsel make—ought not he to have seen them? I think you may be pretty safe in concluding that he didn't see them; but ought not he to have seen them if he took the pains to look? Well, that is for you to decide. The testimony is not exactly uniform on the subject of what took place at the critical moment. He says he backed out, and, if I recollect right, Hackett says so, too; but Mr. Stokes says he drove around, forming three-quarters of a circle, but did it very quickly; whirled around as though he had lost his head—some such expression as that. Well, supposing that is strictly true, as Mr. Stokes stated it, would that be sufficient to excuse the defendant in case they were guilty of negligence?

I think, on the whole, gentlemen of the jury, I must so charge you—that it was the fault on his part if he did as Mr. Stokes says, knowing that the cars were coming; that it was such a fault on his part in crossing the road that the defendant would not be liable to him for the damages suffered. That would be the case if he
174 were plaintiff, and that would be the case here if the plaintiff, Mr. Hackett, was liable for his acts. But upon that subject I have already expressed my views."

The foregoing bill of exceptions is hereby signed and sealed by me.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court of U. S.

175 Supreme Court of the United States, of October Term, in the year of our lord one thousand eight hundred and eighty-five.

HENRY S. LITTLE, as Receiver of the Central Railroad Company of New Jersey, Plaintiff in Error,
against
JAMES HACKETT, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Henry S. Little, as receiver of the Central Railroad Company of New Jersey, by Robert W. De Forest, his attorney, and says that in the record and proceedings aforesaid there is manifest error in the following instructions of the honorable court to the jury, to wit:

"If you come to the conclusion that they did not ring the bell,

that they were guilty of negligence, then they would be liable, unless they can make out that the plaintiff on his part was guilty of negligence. Now, at the outset of the consideration of that part of the case we are met with the question of the law: Was the plaintiff responsible for what the driver did? Were the acts of the driver the same as if they had been the acts of the plaintiff? Was the driver, at the time the ser-
176 vant and under the control of the plaintiff in driving his team? Now, gentlemen, on this point I charge you that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance and gives directions to the driver as to the place or places to which he disires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time. If I am a passenger in a railroad train and the railroad crosses another railroad, and there is another train on that other railroad, and the two trains come into collision and both parties are at fault, I may either sue the railroad company on whose train I am travelling, or I may sue the railroad company owning the other railroad; I may sue either or both, if both are at fault. That is clear in the case of a railroad, because I, as a passenger, have no control whatever over the driving of the cars; and it is also true in the case of a street car.

This case is not the case of a railroad car, or a street car,
177 but it is the case of a common carriage, and the question is whether the passenger in a common hack or carriage, driven by a person in the employ of the owner of the carriage, has any more control over the driver than a passenger has in a railroad train. Undoubtedly the cases are not exactly alike. The passenger in the carriage may direct the driver where to go—to such a park, or to such a place that he wishes to see; so far the driver is under his directions; but my charge to you is that as to the manner of driving, the driver of the carriage, or the owner of the hack, in other words, he who has charge of it and has charge of the team, are the persons responsible for the manner of driving, and the passenger is not responsible for that unless he interferes and controls the matter by his own commands or requirements.

"If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers, or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case he is not liable for what the

driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable, because of his interference.

178 "The evidence is before you, gentlemen, on this subject. I cannot recall anything in it to show that the plaintiff took any responsibility about the driving, and if that is so, then he is not liable for what the driver did, but if you think otherwise, if you think he was liable in consequence of any interference with the driver, for what the driver did, then comes up the question whether the driver himself was guilty of any conduct that would prevent him from recovering damages from the defendant had he been injured. On this subject I shall not have much to say to you, gentlemen. You remember the evidence, his own evidence, and the evidence of others, on the subject. He says that when he turned around (he says he backed out and turned into the avenue), and when they turned around and got into the avenue he looked up both ways and could see nothing. Well, if the cars were so close to him as to strike him before he got across and were only going eight miles an hour, it is strange he didn't see them if he looked just before putting his horses upon the tracks, but still it is hardly possible that a man who had seen the cars would have ventured to cross. I think, therefore, that the probability of his evidence being correct in saying he didn't see the cars is pretty strong. But if he did not see them—ought not he to have seen them? That is a point that the plaintiff's counsel make; ought not he to have seen them? I think you may be pretty safe in concluding that he didn't see them, but ought not he to have seen them if he took the pains to look? Well, that is for you to decide. The tes-

179 mony is not exactly uniform on the subject of what took place at the critical moment; he says he backed out, and if I recollect right Hackett says so, too; but Mr. Stokes says he drove around, forming three-quarters of a circle, but did it very quickly; whirled around as though he had lost his head; some such expression as that. Well, supposing that is strictly true as Mr. Stokes stated it, would that be sufficient to excuse the defendant- in case they were guilty of negligence?

"I think on the whole, gentlemen of the jury, I must so charge you that it was a fault on his part if he did as Mr. Stokes says, knowing that the cars were coming; that it was such a fault on his part in crossing the road; that the defendant would not be liable to him for the damages suffered That would be the case if he were plaintiff, and that would be the case here if the plaintiff, Mr. Hackett was liable for his acts. But upon that subject I have already expressed my views."

And the said Henry S. Little prays that the judgment aforesaid may [be] reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

ROBERT De FOREST,
Attorney for Plaintiff in Error.

180 United States Circuit Court, District of New Jersey.

JAMES HACKETT *vs.* HENRY S. LITTLE, as Receiver, &c.

It is hereby stipulated that on the allowance of the bill of exceptions in this cause that the case may be submitted on printed arguments at the next term of the United States Supreme Court within the first thirty days thereof.

Dated April 25th, 1885.

B. WILLIAMSON,
Attorney of Defendants.

181 UNITED STATES OF AMERICA, }
District of New Jersey, } *ss:*

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify the foregoing to be a true transcript of the record and proceedings in the suit of James Hackett, plaintiff, against Henry S. Little, receiver of the Central Railroad Company of New Jersey, as fully as the same remains of record and on file in my office at Trenton, in said district.

In testimony whereof I hereto set my hand and affix the seal of said court at Trenton, in said district, this ninth day of October, A. D. eighteen hundred and eighty-five.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

(Here follows diagram marked page 182.)

Endorsed on cover: New Jersey C. C. U. S. No. 1172. Henry S. Little, receiver of the Central Railroad Company of New Jersey, plaintiff in error, *vs.* James Hackett. Filed October 22, 1885.

116-366

SUPREME COURT U.S.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 1172.

HENRY S. LITTLE, RECEIVER OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

against

JAMES HACKETT.

BRIEF OF PLAINTIFF IN ERROR.

R. W. DE FOREST,
Att'y for Pl'ff in Error.

F. L. HALL,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 208 Broadway, N. Y.

Supreme Court of the United States.

HENRY S. LITTLE, RECEIVER OF the Central Railroad Company of New Jersey, Plaintiff in Error, AGAINST JAMES HACKETT, Defendant in Error.	In Error to the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

On the 28th day of June, 1879, the defendant in error, Mr. James Hackett, went from Germantown, Pennsylvania, to Long Branch, New Jersey, on an excursion with the Wholesale Grocers' and Importers' Association. After dinner at the West End Hotel in the village of Long Branch he hired an open carriage or barouche and drove about the village. It was a carriage standing at the hotel for hire, was owned by a livery stable keeper and driven by Joseph Brown, a hackman in his employ. Mr. Hackett invited a gentleman to accompany him, and they went up to the iron pier and down to the Grant cottage, and finally to the railroad station at West End. When Mr. Hackett arrived here he found that he had time to take an extra drive (see testimony James Hackett, p. 6, fol. 11, pp. 13 and 14; fols. 27 and 28), and told the driver to drive through Hoey's Park. In crossing the railroad track to

go from the West End Station to the entrance of the park the carriage was struck by the engine of a passing train, and the defendant in error received the injuries complained of in this action. The train causing the injuries was one being run upon a railroad operated by the plaintiff in error as Receiver of the Central Railroad Company of New Jersey.

Allegations of Error.

The allegations of error are directed solely to portions of the charge of the Court to the jury, and raise but a single point for consideration here: Did the honorable Court err in charging "that where a person hires a public hack or carriage which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains any injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other" * * * * "that as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it, and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that unless he interferes and controls the matter by his own commands and requirements," * * * * "and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did."

Argument.

Briefly, then, the question to be considered is, was Brown, the driver of the carriage, the agent or servant of Hackett, the defendant in error. If he was, it cannot be doubted but that the maxim *respondeat superior* would apply that the negligence of the servant would be attribu-

table to the master, and that the Court erred in charging that the negligence of his driver would not prevent a recovery by this defendant in error.

The leading English cases upon this subject are

Thoroughgood *v.* Bryan, 8 C. B., 115, and
Catlin *v.* Hills, 8 C. B., 123,

decided simultaneously and apparently considered together, though the opinions are by different judges. These decisions are to the same effect.

The former was an action against the owner of an omnibus for the negligence of his driver in running over and killing a passenger alighting in the street from another omnibus.

The Court held that the negligence of the driver of the omnibus from which the passenger was alighting prevented a recovery, and places the decision upon the ground of identity between the passenger and his driver, and says:

"The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if any injury results from their negligence, he must be considered a party to it."

This case established the English rule, and it has, we believe, been followed in all subsequent English cases.

Bridge *v.* Grand Junction R'way Co., 3 Mee. & W., 244.
Waite *v.* Northeastern Ry. Co., 7 W. R., 311.
Child *v.* Hearn, 22 W. R., 864.
Armstrong *v.* The Lancashire & Yorkshire Ry. Co., L. R., 10 Exch., 47.

The English rule, as above stated, has been followed in its entirety in this country only so far as we have been

able to discover, in the State of Pennsylvania, where, in the case of

Phila. & Reading R. R. Co. *v.* Boyer, 97 Pa. St., 91,

it was held that the plaintiff, who was riding in a horse car which collided with a train upon defendant's railroad, must show that the person in charge of the horse car was chargeable with no negligence.

In most of the United States a distinction is made between common carriers and private carriers, and in many a still further distinction between private carriers conveying passengers having no control over the person in charge of the vehicle in which they are being transported, and instances in which the passengers possessed such control.

A brief resumé of the decisions of the Courts of the different States will show wide differences of opinion, not only between the different States, but also between different decisions of the Courts of the same State, but it will be noticed, and the attention of the Honorable Justices of this Court is particularly called to the fact, that the authorities are unanimous in holding that where there is the power to control, whether exercised or not, the negligence of third parties is imputable to the plaintiff seeking recovery, and that it is only where such power is wanting that the decisions are to the contrary.

In NEW JERSEY it is held in the leading case of

Bennett *v.* N. J. R. R. Co., 7 Vroom, 225,

that the driver of a horse car is not the agent of the passenger so as to render such passenger chargeable for the negligence of the driver, and the decision is clearly based upon want of control. The learned Chief Justice Beasley, who delivered the opinion of the Court, says: "The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant." * * "Under the circumstances in question the

passenger is a perfectly innocent party, having no control over either of the wrongdoers."

This was the case of a collision between a railroad train and a horse car.

We do not find any decisions in this State directly upon the question involved here, but impliedly from the above decision, where there was power to control a third party, the negligence of such third party would be fatal to a recovery.

In NEW YORK the decisions are numerous, but greatly conflicting, even in the Court of last resort.

Beginning with

Chapman *v.* N. H. R. R. Co., 19 N. Y., 341,

the Court of Appeals held in the case of a collision between two railroad trains that a passenger by railroad can recover against another railroad company, although the persons in charge of the train in which he was riding were negligent. This expressly upon the ground of want of control. The cases of Thoroughgood *v.* Bryan, Catlin *v.* Hills, and Bridge *v.* G. J. Rwy. Co., *supra*, were considered and dissented from.

Subsequently, however, in

Brown *v.* N. Y. C. R. R. Co., 32 N. Y., 597,

the same Court held that where a passenger in a public stage was injured by defendants' train it was not error to leave it to the jury to say whether the driver was negligent.

The last above authority was followed in

Mooney *v.* Hudson River R. R. Co.. 5 Rob., 548 and

Beck *v.* East River Ferry Co., 6. *Id.*, 82.

In the former case Robertson, *C. J.*, delivering the opinion of the Court, says: "If he (the party injured) drives himself, and is guilty of negligence, he clearly could not recover. If he was driven by a hired servant of his own there would be no more ground for a recovery, or

even if in a vehicle driven by the servant of another of which he had hired the use."

It is true that the above remarks are *obiter*, but they serve to indicate the opinion upon the exact question under consideration here, of a judge of long experience, whose opinions have received much consideration.

In Webster *v.* Hudson River R. R. Co., 38 N. Y., 260, the Court of Appeals return to their former ruling, and hold that the negligence of employees of a railroad company is not attributable to a passenger where he was not personally negligent, and, as in the case of Chapman *v.* N. H. R. R. Co., *supra*, the decision is based on the want of control.

To the same effect is

Barrett *v.* Third Ave. R. R. Co., 45 N.Y., 628.

The case of

Robinson *v.* N. Y. C. & H. R. R. R. Co., 66 N. Y., 11,

is the leading authority in that State in the class of cases where the injury complained of is sustained by a person riding in a private conveyance at the invitation of another, and being himself without personal negligence.

It is there held, that the negligence of the driver is not to be imputed to the third person—the person receiving the injury—for the reason that there is lack of control.

This decision is followed in

Dyer *v.* Erie R. R. Co., 71 N. Y., 228, and

Masterson *v.* N. Y. C. & H. R. R. R. Co., 84 N. Y., 247.

In all of these cases the point is expressly made that the plaintiff was not in the employ of the negligent party, nor in any sense his agent, nor were they engaged in a joint enterprise or employment, and also that the plaintiff had no power to control or direct the driver.

In MASSACHUSETTS, in the case of

Smith *v.* Smith, 2 Pick., 621,

the contributory negligence of the driver of plaintiff's horse was imputed to plaintiff in an action for injury to the horse, caused by the negligence of the defendant, but the relationship between the plaintiff and the driver does not distinctly appear.

In OHIO, in the case of

Transfer Company *v.* Kelly, 36 Ohio, 86,

it is held that in an action by a railroad passenger (who was in fact without fault himself) for a personal injury against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to plaintiff, so as to charge him with contributing to his own injury, because the relationship of agent or servant did not exist, and there was no power of control.

In INDIANA, in the recent case of

Town of Albion *v.* Hetrick, 90 Ind., 545,

it is stated to be the law of that State, by Bickwell, *C. C.*, who delivered the opinion of the Court: "That the plaintiff cannot recover if his own negligence, or that of his servant or anybody for whom he is responsible contributed to the injury," and he adds: "But to hold that the plaintiff's right of action can be defeated by the negligence of some stranger, would be in effect making him responsible for the stranger the same as he would be for his own servant."

In ILLINOIS, in a case where the parents of a boy intrusted him with a neighbor, the boy, while in the neighbor's wagon, with the neighbor driving, while crossing a railroad track was struck by a passing train and killed.

Scott, *J.*, says in his opinion: "The accident is attributable to the thoughtless conduct of the witness Jones, in driving his team upon the crossing without observing due caution. * * * * But his (the boy's) parents had intrusted him, at least suffered him to be in the wagon with Jones on the highway, and if he (Jones) failed to

observe due care for their personal security, or thoughtlessly drove into dangers that were apparent to an ordinary observer, the railroad company is not responsible for the results."

T. W. & W. R'way Co. *v.* Miller, 76 Ills., 278.

In MICHIGAN, in

Cuddy, Adm'r, *v.* Horn, 46 Mich., 596,

which was the case of a collision of a chartered steamboat on which plaintiff's intestate was a passenger, but was not controlled by officers appointed by plaintiff, it was held that the negligence of the officers was not attributable to him; and it is said by Marston, *C. J.*, that "The reason for holding a person riding in a private conveyance identified with the driver thereof, and therefore affected by the negligence of the latter, cannot fairly or justly be held applicable to cases like the present. In the case of a private conveyance the driver is under the control and direction of the passenger, and if not, the latter may well decline to entrust his safety further in such conveyance. When, however, a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either."

In IOWA, in an action for damages for injuries received at a railroad crossing by collision with a train, where it appears that the team was driven by another and plaintiff was a passenger, he must rely upon the diligence of the driver for a recovery, and the driver's negligence will defeat his right.

Payne *v.* C., R. I. and P. R. R. Co., 39 Iowa, 523.

Also in a case where plaintiff was out sleighing with a friend, who was driving, and the sleigh was turned over by a small mound in the street, it was held that the knowledge, or want of knowledge, on the part of the plaintiff that his friend who was driving when the accident occurred was an habitually careless driver, was immaterial. If his friend was negligent on the occasion he cannot recover.

Stafford *v.* City of Oskaloosa, 57 Iowa, 749.

In WISCONSIN, in the case of

Prideaux *v.* City of Mineral Point, 43 Wis., 513,

Ryan, *C. J*, in delivering the opinion of the Court, says:

"It is proper to say, however, that in the present state of society it is a substantial necessity for all or most travelers to avail themselves of public conveyances, and that there might be great difficulty in applying to them the rule of personal trust and agency applicable to private conveyances. In the latter case, where the agency of a person in control of a private conveyance is express, there is no difficulty in the rule. The contributory negligence of the servant will defeat the master's action for neglect against a third person, and it seems that there ought to be as little difficulty in the rule when the agency is implied only. One in a private conveyance voluntary trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own and assumes the risk of the skill and care of the person guiding it. * * There is a personal trust in such cases which implies an agency. * * * One enters a public conveyance in some sort of moral necessity; one generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of every thing, except that which is most immediately important to himself, and trusts nothing to the sufficiency of the vehicle in which he voluntarily travels, nothing to the care or skill of the person in charge of it. His voluntary entrance is an act of faith in the driver—by implication of law he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view."

The opinion contains a criticism upon the cases of

Robinson *v.* N. Y. C. R. R. Co., *supra.*
Chapman *v.* N. H. R. R. Co., *supra.*
Knapp *v.* Dagg, 18 How. Pr., 165.
Metcalf *v.* Baker, 11 Abb. N. S., 431.

This was an action by husband and wife for injuries to the wife, alleged to have been caused by a defective street in the defendant city. She was riding with a friend who was driving a team hired at a livery stable.

To the same effect is the case of

Otis *v.* Town of Janesville, 47 Wis., 422.

A careful search through the reports discloses but a single case in which the facts were exactly similar to those in the case which we are considering.

This is

Callahan *v.* Sharp, 27 Hun. 85.

decided by the General Term of the Second Department of New York, in 1882, and the decision subsequently unanimously affirmed by the Court of Appeals in 95 N. Y., p. 672. Dykman *J.*, in delivering the opinion of the Court below, thus states the facts and the law :

"The wife of plaintiff and mother of the deceased child ordered a two-horse coach, with a driver, from the keeper of a livery stable, to attend a funeral in the city of Brooklyn. The coach, horses and driver were furnished, and the wife, with four children, including the deceased, rode in the coach to the funeral and, at the close of the ceremonies, all re-entered the coach, and the driver started to drive them home. As they came near Atlantic Avenue, a train of cars on the defendants' railroad approached from the east, and the flagman waved his red flag to the driver and the horses were brought to a stand, and stopped about sixteen or seventeen feet from the track, and the flagman stood in front of the horses and waved the engine forward with his white flag, as a signal that all was right. The train proceeded, and the driver gathered up the reins and struck the horses with the whip, and swung them to the right of the flagman, and they made two or three plunges and the engine struck them as they reached the track, and so the disaster came. * * * *

An important and serious question presented in this case

is, whether negligence of the driver of the coach can be imputed to the occupants, and its solution depends on the relation they sustained to each other. The coach and driver were hired by the wife of the plaintiff to proceed entirely on her business; she had entire control and direction of the driver, and he was her servant and she was his superior, so far as orders and directions went in relation to that excursion. She had absolute control of the business in which the driver was engaged, and exclusive direction of the means and manner of its accomplishment, and the power and right to direct the conduct of the driver in all matters pertaining thereto. When the flagman brought the horses to a stop, she had authority to direct and command him to stand or to recede, and to forbid a forward movement, and a prudent regard for the safety of herself and family would have dictated such direction. The disaster resulted from failure to exercise caution at that time in that manner. Plainly, the power of control over the driver existed without exertion, and thus unrestrained and carelessly he precipitated the occupants of the coach into danger, resulting in death. If, therefore, this driver was imprudent and careless, it was because he was left unrestrained, and his want of care is fairly imputable to the wife of the plaintiff, who had control and management of the whole business, and could have prevented the misfortune. His omissions are her omissions.

There are cases where one travels in a vehicle over which he has no control, in which he is not responsible for the negligence of the driver. (Dyer *v.* Erie R. Co., 71 N. Y., 228; Robinson *v.* N. Y. C. and H. R. R. R. Co., 66 *Id.*, 11; Masterson *v.* N. Y. C. and H. R. R. R. Co., 84 *Id.*, 247.) But these cases proceed on the ground that the plaintiff had no control of the vehicle or the driver, and had no authority to give directions for their movements.

So it is held that a passenger by railroad has no identity with the proprietors of the train conveying him, sufficient to prevent a recovery against the proprietors of another train for damages resulting from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners (Chapman *v.* New Haven R. R. Co., 19 N. Y., 341), but this is on the ground that

the plaintiff had no control over the train on which he was riding. (Webster *v.* Hudson R. R. R. Co., 38 N. Y., 262; Colegrove *v.* N. Y. and N. H. R. R. Co., 20 *Id.*, 492.) These authorities have no application to the present case.

It may be stated for a general rule, that where the relation of superior and subordinate exists, the maxim *respondeat superior* has application coextensive with the relation. 'Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts, committed during such temporary employment by another' (Moaks' Underhill on Torts, 42).

As the conduct of the driver of this coach was subordinate to the direction and command of the plaintiff's wife, negligence on his part was attributed to her."

Upon the affirmance of the judgment below, by the Court of Appeals, no opinion was rendered, but we have examined the briefs of counsel for both appellant and respondent, on file in the Library of the Law Institute, in the City of New York, which were submitted on the argument before that Court, and find that the points presented were precisely the same as those considered in the decision, a portion of which we have quoted above.

We further cite, as to the elementary principle,

McGuire *v.* Grant, 1 Dutch.. 356,

where the law is stated by Elmer, *J.*, to be that, "A master is responsible for the tortious acts of his servant which were done in his service. This responsibility grows out of, is measured by, begins and ends with his control over them. If it is duty to control them in what they do he is responsible for his neglect."

Also,

Blake *v.* Ferris 5 N. Y., 48,

"The *immediate employer* of the agent or servant through whose negligence an injury occurs is the person responsible for the negligence of such agent or servant. To him the principle *respondeat superior* applies. There cannot be two superiors *severally* responsible in such case."

A careful examination of a very large number of reported cases has enabled us to discover no one in which, where the element of power to control existed, it has been held that the negligence of the driver was not to be imputed to the passenger.

In view, then, of the authorities which we have cited above, and the arguments sustaining our position contained in them, we submit that the relationship of master and servant existed between them, and that negligence of the driver Brown is to be imputed to the defendant in error Hackett.

It is further respectfully submitted that, if this Court shall hold that the full relationship of master and servant did not exist between the defendant in error and the driver Brown, that there still remained the *power* to control the driver, which was inherent in the hiring, as well as to the manner of his driving as to the places where he should go; that, the power *existing*, it was the *duty* of the defendant in error to exercise that power, to prevent a negligent act on the part of the driver, where there was a known imminent danger being encountered, and that by a failure to exercise such power the negligence of the driver is properly imputable to him.

Evidence of Negligence.

The evidence showing the negligence of the driver seems conclusive upon that point.

The carriage in which Hackett was riding was an open barouche, without any sides or curtains to prevent an uninterrupted view, the driver's seat being somewhat higher than the other seats. The driver drove the carriage alongside the lower or southerly end of the platform at the West End Station, with the horses facing north in the direction from which the train which afterwards came into collision with the carriage was coming. Just before they got to the depot Mr. Hackett spoke about the time and about going to Mr. Hoey's park. It would seem that the decision to drive to the park was reached just as they arrived at the platform, for the driver says he did not get

quite stopped, so instead of turning his horses around, he backed them around and headed them toward the track (Test. Jos. W. Brown, fols. 50 and 51). He thus kept his horses' heads in the direction from which the train was coming.

The driver claims that he looked down the track and up the track and then started to cross (Test., fol. 51), but concludes by saying that he looked south and saw nothing (Testy., fol. 51). He admits that he could see north about 100 yards to the ticket box (Test., fol. 51). The freight cars of which he speaks were near West End (Hulick) avenue, which is 400 or 500 feet distant north from Brighton avenue, where the accident occurred (see diagram and test. J. R. Moore, fol. 117). As the carriage reached the platform somebody said, "There is a train coming," and the driver said he would have to get out of there, and the horses were wheeled around. Mr. Stokes, who was riding with Mr. Hackett, says: "I saw the train coming and I thought we would go back the way we came, but much to my surprise, the horses were driven around and driven over the track" (Test., fol. 147). "I saw the train before we left the platform" (Testy., fol. 151, also fol. 159).

The position of the driver was even more advantageous for seeing the incoming train than Mr. Stokes', because of his higher seat. He knew it was coming, for he was leaving the platform because it was coming. If he had not been grossly negligent he would never have made the attempt to cross in front of it.

A reason for his making his hazardous attempt is found in the fact that he was to get fifty cents extra if he took Mr. Hackett through Hoey's Park. The incoming of the train would block the crossing and cause him delay in getting across to the opposite side, where the entrance to the park was.

The incoming train was one which regularly stopped at the West End Station. It did so on the day of the accident, and was going not faster than eight miles an hour when the accident occurred (Test'y, fol. 126). It stopped in its usual position. The usual signals were given of blowing the whistle and ringing the bell as the

station and crossing were approached. Mr. Hackett and the driver say they did not hear them, which is at best but negative evidence, and must yield to the positive remembrance of both the engineer and fireman on the locomotive, that the whistle was blown and the bell rung from at least a distance of about 80 rods north of West End avenue (Test'y, fols. 122, 123, 131, 137, 138 and 139). Steam was shut off on the engine at the time it passed the ticket office (Test'y, fol. 140).

When first seen by the engineer and fireman the horses were not upon the track.

The law as to the care necessary to be observed in crossing railroad tracks is thus stated in the recent admirable work of Wood on Railway Law :

"A traveler approaching a railroad track, in crossing a highway, is bound to exercise ordinary prudence—such prudence as is fairly commensurate with the nature of the risk. If he can see for a long distance up and down the track, he is bound to look to see whether a train is approaching, and if the track can only be seen for a short distance, he is bound to *look and listen* for an approaching train, and where by the exercise of these senses he might have avoided the injury no recovery can be had. No man has a right to depend entirely upon the care and prudence of others; he is bound himself to exercise due care to prevent injury to himself from the lack of proper caution in others. But if after having looked and listened without seeing or hearing an approaching train within a reasonable distance of the crossing, he is by reason of a neglect of the defendant to blow the whistle or ring the bell at a reasonable distance from the crossing, run upon and injured, liability attaches therefor. A person approaching a railway crossing is bound to know that he stands in the presence of a serious danger if he attempts to cross it without the exercise of proper caution. He has no right to rely upon the presumption that the company's agents who are operating a train will notify him of its approach. He is, as a prudent man, bound to 'look and listen,' and take such measures as common

prudence in view of the dangers and consequences of a neglect to do so suggest. * * *

"This is a rule of law, and it is only in exceptional instances that the question as to whether his neglect to take such precaution is excusable is for the jury."

Wood's Railway Law, pp. 1302–1305, and the large number of cases there cited.

We submit that the negligence of the driver was peculiarly gross, and that it rendered him plainly liable.

The writ of error should be sustained and judgment absolute given for the plaintiff in error, dismissing the bill of complaint, with costs.

ROBERT W. DE FOREST,
Att'y for Plff. in Error.

FRANK L. HALL,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1885. No. 1172.

HENRY S. LITTLE,

Receiver of the Central Railroad Company of New Jersey,

PLAINTIFF IN ERROR,

vs.

JAMES HACKETT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

ROBT. H. HINCKLEY,
PETER L. VOORHEES,
For Defendant in Error.

LITTLE, *Receiver*,		U. S. S. C.
		1172, Oct. T., 1885.
vs.		
HACKETT.		Error to Circuit Court of U. S. for District of New Jersey.

This was an action brought by James Hackett to recover for injuries caused by a collision of a carriage with a train operated on the Central Railroad of New Jersey by the plaintiff in error, he being at the time of the accident the Receiver of said Railroad. The collision occurred near the West End Station, Long Branch. The facts as developed at the trial were these: Hackett and a companion named Stokes hired a carriage at the West End Hotel to take a drive around the place from point to point (see page 11 of Record). The carriage was owned by one Layton, and was driven by Joseph Brown, who was employed for the season by Layton (see page 22 of Record). While driving across the railroad at Brighton Avenue to enter Hoeys' Garden the carriage was struck by the locomotive and Hackett was injured. The defence was contributory negligence in driving on the track. The evidence for the plaintiff showed that the horses that were used were sound and kind; that on arriving at the station the carriage stopped. No bell or whistle was sounded (pages 27, 29 and 36 of Record). No flagman was on duty (page 24 of Record). The train was going very fast—so fast that by the collision the driver and Mr. Hackett were both thrown out of the carriage and over the tracks and against the fence of Hoeys' Garden (page 24 of Record). Stokes, who was called by the Receiver, jumped out of the carriage and was not hurt. He testifies that he saw the train coming, and yet he did nothing to prevent the driver from driving on the track. Both Hackett and the driver say they neither saw nor heard the train.

ARGUMENT.

The case raises the question of *imputed* negligence. That is to say, the plaintiff in error alleges that the driver Brown was negligent in the manner in which he handled the team, and that his negligence is to be imputed to Hackett, the defendant in error.

We deny that the testimony shows any contributory negligence on the part of Brown, and we insist that the verdict of the jury being for Hackett, and damages being awarded to the extent of $7000 against the Receiver of the railroad company, shows that this point was determined by the jury against the plaintiff in error.

The learned judge, however, in his charge distinctly raised the point of imputed negligence.

The court then charged the jury, which returned a verdict for the plaintiff of seven thousand dollars ($7000).

The portions of the charge of the court to which exceptions are taken are as follows:—

The honorable court erred in instructing the jury that, "If you come to the conclusion that they did not ring the bell that they were guilty of negligence, then they would be liable, unless they can make out that the plaintiff on his part was guilty of negligence. Now, at the outset of the consideration of that part of the case we are met with the question of law: was the plaintiff responsible for what the driver did? Were the acts of the driver the same as if they had been acts of the plaintiff? Was the driver at the time the servant and under the control of the plaintiff in driving his team? Now, gentlemen, on this point I charge you that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of

the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time. If I am a passenger in a railroad train, and the railroad crosses another railroad, and there is another train on that other railroad, and the two trains come into collision, and both parties are in fault, I may either sue the railroad company on whose train I am traveling, or I may sue the railroad company owning the other railroad; I may sue either or both, if both are at fault. That is clear in the case of a railroad, because I, as a passenger, have no control whatever over the driving of the cars; and it is also true in the case of a street car. This case is not the case of a railroad car or a street car, but it is the case of a common carriage, and the question is whether the passenger in a common hack or carriage, driven by a person in the employ of the owner of the carriage, has any more control over the driver than a passenger has in a railroad train. Undoubtedly the cases are not exactly alike; the passenger in the carriage may direct the driver where to go; to such a park or to such a place that he wishes to see; so far the driver is under his direction, but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of the team—are the persons responsible for the manner of driving, and the passenger is not responsible for that unless he interferes and controls the matter by his own commands or requirements.

If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference.

The evidence is before you, gentlemen, on this subject. I cannot recall anything in it to show that the plaintiff took any responsibility about the driving, and if that is so, then he [is] not liable for what the driver did; but if you think otherwise, if you think he was liable in consequence of any interference with the driver, for what the driver did, then comes up the question whether the driver himself was guilty of any conduct that would prevent him from recovering damages of the defendant had he been injured. On this subject I shall not have much to say to you, gentlemen. You remember the evidence, his own evidence and the evidence of others, on the subject. He says that when he turned around (he says he backed out and turned into the avenue), and when they turned around and got into the avenue he looked up both ways and could see nothing. Well, if the cars were so close to him as to strike him before he got across, and were only going eight miles an hour, it is strange he didn't see them if he looked just before putting his horses upon the tracks; but still it is hardly possible that a man who had seen the cars would have ventured to cross. I think, therefore, that the probability of his evidence being correct, in saying he didn't see the cars, is pretty strong; but if he did not see them, ought not he to have seen them? That is a point that the defendant's counsel make—ought not he to have seen them? I think you may be pretty safe in concluding that he didn't see them; but ought not he to have seen them if he took the pains to look? Well, that is for you to decide. The testimony is not exactly uniform on the subject of what took place at the critical moment. He says he backed out, and, if I recollect right, Hackett says so too; but Mr. Stokes says he drove around, forming three-quarters of a circle, but did it very quickly; whirled around as though he had lost his head—some such expression as that. Well, supposing that is strictly true, as Mr. Stokes stated it, would that be sufficient to excuse the defendant in case they were guilty of negligence?

I think, on the whole, gentlemen of the jury, I must so charge you—that it was the fault on his part if he did as Mr. Stokes says, knowing that the cars were coming; that it was such a

fault on his part in crossing the road that the defendant would not be liable to him for the damages suffered. That would be the case if he were plaintiff, and that would be the case here if the plaintiff, Mr. Hackett, was liable for his acts. But upon that subject I have already expressed my views."

The foregoing bill of exceptions is hereby signed and sealed by me.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court, U. S.

This ruling is the only error assigned.

The doctrine of imputed negligence is very fully discussed in Thompson's Carriers of Passengers, chapter vii, page 273.

The "imputing of negligence" is said to have originated in England in the case of Bridge *vs.* Grand Junction Railway, 3 Mees. & Wells, 244, and was discussed in Thorogood *vs.* Bryan, 8 Common Bench Reports, 115; see also Thompson on Carriers of Passengers, *supra.*

The facts of this last case were as follows:—

The man injured was riding in an omnibus, about 8 o'clock at night; he wished to get out and did not wait for the omnibus he was in to draw up to the curbstone, but got out while it was in motion, and in endeavoring to reach the curb he was struck by the defendants' omnibus and injured so that he died. His administrator sued.

The defendants argued that the plaintiff was not entitled to recover, because the injury was caused by the negligence of the driver of the omnibus the deceased was in, because the injured man was allowed to alight before drawing up to the curb.

The court held that having selected the mode of conveyance he was so *identified* with the driver of it that the negligence of the driver was the negligence of the deceased, and hence the plaintiff could not recover.

Very properly this ruling has been doubted by high authority in England and directly departed from in the United States.

Thompson on Carriers, page 285, in a foot-note, says: "In the sixth American edition of Smith's Leading Cases," vol. i, page 450, under the case of Ashby *vs.* White, occurs this language, 'If two drunken stage coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should by a fiction be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer.' This, nevertheless, appears to be the result of the decision of Thorogood *vs.* Bryan, but it may be questioned whether the reasoning of the court in that case is consistent with those of Rigby *vs.* Hewitt, 5 Exch. 240, and Greenland *vs.* Chaplin, 5 id. 243, or with the series of decisions from Quarman *vs.* Burnett, 6 Mees. & Wells, 599, to Reedie *vs.* London R. Co., 4 Exch., 244, and Dalzell *vs.* Tyrer, 28 L. J. (Q. B.), 52. Why, in this particular case, both wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them and whom they have both injured, is a question which seems to deserve more consideration than it received in Thorogood *vs.* Bryan."

The word "fiction" is not too strong a word to apply to the reasoning of the original case. To "identify" a passenger who has no control over the vehicle in which he is riding with the driver, who drives as he pleases, is veritable fiction. See Armstrong *vs.* Lancashire Railroad Company, L. R. 10 Exch. 52. The fallacy of this reasoning was exposed in Chapman *vs.* New Haven Railroad Company, 19 New York, page 341.

A train on the Harlem Road ran into a train on the New Haven Road. The plaintiff, a passenger, was injured and sued the latter corporation. The defendants tried to escape by imputing to plaintiff the negligence of the Harlem Railroad employees. The court say, page 343: "To say that he is chargeable with negligence because they have been guilty is plainly not founded on any fact of conduct on his part, but is a mere fiction." And again, on page 344, "It is entirely plain that the plaintiff had no control, no management, even no advisory power, over the train on which he was riding."

From this case, Thompson, on page 284, in his notes on Carriers of Passengers, says, "The reasonableness of the rule of imputed negligence will hardly be questioned where the person to whom the negligence of another is imputed has control, management or advisory power over the conduct of such negligent person, or where, from the necessity of the case, such negligent person is by lawful authority vested with the control and direction of the movements of the person to whom his negligence is imputed."

Now if at this point we examine the charge of the learned judge who tried the cause, we will see that he left the question fairly to the jury, so fairly that no ground of exception can properly be found. After stating the general principle, he says, page 77 of Record, "Ordinarily in a public hack the passengers do not control the driver, and therefore, I hold, that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference. The evidence is before you, gentlemen, on this subject. I cannot recall anything in it to show that the plaintiff took any responsibility about the driving, and if that is so, then he is not liable for what the driver did; but if you think otherwise, if you think he was liable, in consequence of any interference with the driver, for what the driver did, then comes up the question whether the driver himself was guilty of any conduct that would prevent him from recovering damages of the defendant had he been injured."

Could anything be fairer for the defendant? It is left for the jury to find whether Hackett had or assumed "any control, management or advisory power" over Brown, the driver, and by their verdict, we submit, they find he did not.

Two cases decided in New Jersey are of point here.

The first one,

7 Vroom, 225, Bennett *vs.* N. J. R. R. and Trans. Co.,

where it was held the driver of a street car is not the agent of a passenger thereon so as to render such passenger chargeable with the negligence of such driver.

Where a passenger on a street car is injured by the carelessness of the engineer of a railroad company in the management of a locomotive, it is no defence that there was contributory negligence in the driver of the street car.

The court in commenting on Thorogood *vs.* Bryan, say: "I have entirely failed to perceive how it is that a passenger in a public conveyance becomes identified in any legal sense with the driver of such conveyance" (see page 227).

The next case is one very recently decided, which is on all fours with our case. It is reported in 18 Vroom, N. J., page 161, New York, Lake Erie & Western R. R. Co. *vs.* William N. Steinhenner.

The plaintiff was riding with his four nieces in a coach owned by Merkins, and driven by a driver employed by Merkins. The coach, horses and driver were hired by plaintiff of Merkins for the journey, in course of which the collision occurred.

The judge who tried the cause refused to charge that the negligence of the driver of the coach was imputable to the plaintiff, and did not submit the question of the driver's negligence to the jury.

(NOTE.—Mr. Justice Bradley, who tried Hackett's case, *did* submit the question of negligence of the driver very fairly to the jury. See foot of page 77 and top of 78 of Record. And we submit the jury by their verdict found that the driver Brown was not guilty of negligence.)

The opinion of the court argues the question of identification of passenger with carrier, and on page 167 occurs this passage.

Biglow's Leading Cases, 726–729.

Mr. Biglow concludes a review of the cases, including Thorogood *vs.* Bryan, with the expression of his opinion that "the only case where the so-called doctrine of identification or imputation can be applied is where the passenger actually participates in the carrier's fault, as by urging him on, or by plainly manifesting approval of his course and thus encouraging it."

The court further says—Depue, Judge:—

"In the principle which governs in this respect there is no distinction between a public conveyance in which a passenger takes passage and a coach hired by him from a livery for a particular journey; nor is the situation changed by the fact that the negligence of the driver is invoked simply as contributory negligence to exclude the passenger from his action against a third person for an injury resulting from the negligence of both parties. As the Chief Justice points out in his opinion in Bennett *vs.* N. J. R. R. Co., the identification of the passenger with the driver for the purpose of fixing on the former responsibility for the latter's act, can result only from considering the driver as the servant of the passenger; and the driver cannot be converted into his servant for the single purpose of preventing the passenger from bringing suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. The identification must be so complete that the passenger would not only be debarred from a suit against the proprietor of the coach for the driver's negligence in the particular instance, but would also be responsible to third person for injuries sustained by the carelessness of the driver in the course of the journey. Quarman *vs.* Bennett and kindred cases show that the relation of master and servant is not created by such a hiring, and that such a responsibility does not arise from an employment under it. There may, as was said by Baron Parke in Quarman *vs.* Bennett, "be special circumstances which may render the hirer of horses and servants responsible for the neglect of a servant. Though not liable by virtue of the general relation of master and servant, he may become so by his own conduct, as by taking the actual management of the horse, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment and the like." McLaughlin *vs.* Pryor, 4 M. & G. 48; S. C. 1 Car. M. 354, is a precedent of an action successfully prosecuted against the hirer of a carriage and horses for a trespass committed by the driver, who was the servant of the man who let the carriage—the defendant's

liability for the driver's act being enforced on the ground that he sat upon the box and countenanced, encouraged and assented to the driver's act, and made the latter's negligent act his own. It may also be that a passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked, whether as a cause of action for an injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained, the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring. If the law were otherwise, not only the hire of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach-stand, for the consequence of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that too, though the passengers were ignorant of the character of the driver and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried. In this case there were no special circumstances which would make the driver's negligent act the act of the plaintiff. The plaintiff hired the coach to carry himself and four nieces to a particular place. The journey was along a public road not specially dangerous except in the fact that it crossed defendant's railroad. The coach was an ordinary closed coach, with two seats inside and a driver's box in front, and a window on each side. The plaintiff and two of his nieces occupied the back seat. The plaintiff testified that he told the driver before starting to be careful about crossing the railroad;

that the driver slackened up as he approached the crossing; that he (the plaintiff) listened all the time, and made it his particular business to look and see whether any train was coming; that he did not hear any whistle or bell, or the approaching train, and was not aware of the approach of the train until it was right upon them. If the driver was negligent in venturing upon the track, the plaintiff neither encouraged his negligent act nor did he contribute to it by any negligence of his own. The judge's refusal to charge that the driver's negligence was imputable to the plaintiff was correct."

HINCKLEY.
VOORHEES.